THE

PRINCIPLES OF EQUITY:

A

TREATISE

ON THE

SYSTEM OF JUSTICE ADMINISTERED

IN

COURTS OF CHANCERY.

BY

GEORGE TUCKER BISPHAM,

PROFESSOR OF EQUITY JURISPRUDENCE IN THE UNIVERSITY OF PENNSYLVANIA.

FOURTH EDITION.

PHILADELPHIA:
KAY & BROTHER
LAW BOOKSELLERS, PUBLISHERS AND IMPORTERS.
1887.

Entered according to the Act of Congress, in the year 1874, by

GEO. TUCKER BISPHAM,

in the Office of the Librarian of Congress, at Washington.

Entered according to the Act of Congress, in the year 1878, by

GEO. TUCKER BISPHAM.

in the Office of the Librarian of Congress, at Washington.

Entered according to the Act of Congress, in the year 1882, by

GEO. TUCKER BISPHAM,

in the Office of the Librarian of Congress, at Washington.

Entered according to the Act of Congress, in the year 1887, by

GEO. TUCKER BISPHAM,

in the office of the Librarian of Congress, at Washington.

COLLINS, PRINTER.

PREFACE TO THE FOURTH EDITION.

In the present edition of this book the text has been somewhat enlarged, in order that the advances which have been made in Equity Jurisprudence, during the past few years, might be duly noted.

Whether the terms "legal fraud" and "constructive fraud" should continue to be used; how far the courts should go in granting mandatory injunctions on preliminary hearing; what is the foundation and what the proper extent of the doctrine that certain unsecured claims may, in proper cases, be given priority over mortgages; and to what cases the remedy by Creditors' Bills should be extended — these are some of the topics which seemed to require, and have therefore received, particular attention.

The text has, moreover, been modified in other places, wherever such alterations appeared to be required by clearness or by changes in the law itself. The propositions throughout the book have, also, been verified

and illustrated by references to many recent decisions of the American and English courts.

In the collection of authorities for the present edition, the author has been greatly assisted by A. H. WINTERSTEEN, CHARLES H. BANNARD and ROBERT RALSTON, Esqrs., of the Philadelphia Bar.

G. T. B.

September, 1887.

PREFACE TO THE FIRST EDITION.

During the past few years the growth of equity jurisprudence, both in a scientific and a practical aspect, has been very great.

The decisions of the courts, especially in England, have been marked by a freshness and a vigor which have infused new life into the whole body of chancery law, and have rendered it not only attractive to the student, but of immense usefulness in its application to the business affairs of men.

This practical usefulness has been extended by statute, as well as by judicial decisions; and legislation upon this subject has, in England, culminated in the passage of the Supreme Court Judicature Act of 1873, by which it is provided that the principles of equity shall hereafter be adopted, for the purposes of the administration of justice, in all the courts.

To a certain extent the literature of this branch of the law has kept pace with the growth of the law itself. Treatises are constantly being produced in which particular subjects connected with the jurisprudence of courts of chancery are ably and elaborately discussed; and works upon Trusts, Injunctions, Fraud, Estoppels,

and kindred topics, have multiplied in the libraries of the profession. Moreover, in England, efforts have been made to generalize the progress which the science of equity has been making; and several treatises, of a more or less comprehensive character, have been written in which the advances of the law in this great field of justice have been pointed out.

In the United States, however, scarcely any attempt has been made recently in this direction. The efforts of those members of the profession who have the time and inclination to devote themselves to legal literature, have been directed towards the production of treatises upon particular subjects, or to the annotation of existing standard commentaries. Hence, there seems to have arisen a want for some general work in which the development and present condition of equity jurisprudence should be expressed.

The present treatise is an attempt to supply this want. The effort has been to explain the modern doctrines of courts of equity, and to illustrate the manner in which they have been applied; and at the same time to exemplify and define the principles of equity as they have existed in the English law from the earliest times.

It will be seen, upon examination, that the general plan of the treatise is based upon the division suggested by Mr. Spence in his celebrated work upon the Jurisdiction of the Court of Chancery, viz., Equitable Titles, Equitable Rights, and Equitable Remedies; but that the arrangement of the subdivisions under these general heads is to a great extent original.

As the present book is designed for students as well as for practitioners, one great object has been to avoid a superabundance of citations upon the one hand, and upon the other any omission of authorities by which the doctrines stated in the text ought to be verified and illustrated.

It cannot be hoped that the proper mean between these two extremes has been always observed; but it is trusted that the authorities cited have been sufficiently numerous to give to the practitioner in every State the benefit of decisions of his own courts upon the subjects attempted to be explained, while, at the same time, care has been taken not to overcrowd the treatise with masses of authorities upon single points.

In citing particular decisions at any length, selections have generally been made from the modern reports, partly because such volumes are usually within the convenient reach of almost every reader, and partly because in them (and particularly those which contain the decisions of the English equity judges of the present time) the doctrines sought to be explained have been most elaborately discussed, and their application most practically illustrated. For the same and other obvious reasons, the treatises upon particular subjects which have been referred to have almost invariably been those of writers of the present day.

It need hardly be said, however, that while for the purpose of presenting a view of equity jurisprudence as it now exists, modern treatises have been consulted and modern authorities cited, yet, at the same time,

regard has been always had to the ancient decisions wherein the principles of equity have had their birth and their early development. Every writer, as well as every student, should always have in his recollection the advice of Sir Edward Coke, "that in reading any of these new reports he neglect not the reading of the old books of years reported in former ages, for assuredly out of the old fields must spring and grow the new corn."

G. T. B.

Philadelphia, February, 1874.

TABLE OF CONTENTS.

[The References are to the Sections.]

INTRODUCTION.

CHAPTER I.

RISE AND PROGRESS OF THE HIGH COURT OF CHANCERY.

1. Definition of equity.
2. Importance of the historical view of equity.
3. Early English courts; the councils of the king.
4. Ordinary council, or *curia regis:* Exchequer and Common Pleas.
5. Court of King's Bench.
6. Position of the chancellor.
7. Origin of his extraordinary jurisdiction.
8. Cases in which this jurisdiction was exercised.
9. General conclusions deduced from the above—writ of subpœna—pleadings and evidence.
10. Progress of the jurisdiction of the chancellor.
11. Changes in the English system introduced by Act of August 5, 1873.
12. Principles of equity adopted in the United States.
13. Jurisdiction of the federal courts.
14. Changes of mode of procedure in some of the States.
15. Classification of the states upon this subject.

CHAPTER II.

GENERAL OUTLINE OF EQUITABLE JURISDICTION.

16. Three great divisions of equity.
17. Equitable titles; example.
18. Equitable rights; example.
19. Equitable remedies; example.
20. Subjects of equitable jurisdiction: Trusts.
21. Mortgages.
22. Assignments.
23. Accident and Mistake.
24. Fraud.
25. Notice; Estoppel; Election.
26. Conversion.
27. Adjustment; Set-off; Contribution; Subrogation; Exoneration; Marshalling.
28. Equitable liens.
29. Specific performance.
30. Injunctions.
31. Re-execution; Reformation; Cancellation.
32. Account; Dower; Partition; Confusion of boundaries; Rent.
33. Partnership bills; Creditors' bills; Administration suits.
34. Infants, idiots and lunatics.
35. Discovery; Commissions to examine witnesses abroad; Perpetuation of testimony; Examinations *de bene esse.*
36. Bills *quia timet;* Receivers; Writs of *ne exeat;* Writs of *supplicavit.*

CHAPTER III.

MAXIMS IN EQUITY.

37. No right without a remedy.
38. Equity follows the Law.
39. *Vigilantibus non dormientibus Æquitas subvenit.*
40. Between equal equities the law will prevail.
41. Equality is Equity.
42. He who comes into Equity must do so with clean hands.
43. He who seeks Equity must do Equity.
44. Equity looks upon that as done which ought to be done.
45. Between equal equities priority of time will prevail.
46. Equity imputes an intention to fulfil an obligation.
47. Equity acts *in personam.*
48. Equity acts specifically.

PART I.

EQUITABLE TITLES.

CHAPTER I

TRUSTS; THEIR ORIGIN, HISTORY, AND GENERAL NATURE.

49. Definition of Trusts.
50. Distinction between Trusts and *Fidei Commissa.*
51. Origin of Trusts.
52. Trusts before the Statute of Uses; Statute 1 Rich. III., c. 1.
53. Statute of Uses; 27 Hen. VIII., c. 10.
54. General nature of Trusts; Active and Passive Trusts.
55. When trusts will be executed by the Statute; Rules in several States.
56. Lawful and Unlawful Trusts.
57. Executed and Executory Trusts; *Glenorchy* v. *Bosville; Sackville-West* v. *Homesdale.*
58. Reformation of executory instruments creating trusts.
59. Public and Private Trusts.
60. General rules for the devolution of Equitable Estates.
61. Alienation of Equitable Estates; Liability for debts.
62. Exceptions to the general rules of devolution of Equitable Estates.

CHAPTER II.

EXPRESS TRUSTS; AND HEREIN OF VOLUNTARY DISPOSITIONS IN TRUST, OF PRECATORY TRUSTS, AND OF POWERS IN TRUST.

63. Trusts created by direct fiduciary expressions; trusts averable at Common Law.
64. Statute of Frauds.
65. Language by which a Trust may be created.
66. Voluntary dispositions in trust; *Milroy* v. *Lord; Ex parte Pye.*

67. General result of the authorities; *Donaldson* v. *Donaldson; Kekewich* v. *Manning.*
68. Voluntary Assignments for the benefit of Creditors.
69. Meritorious Consideration; *Ellis* v. *Nimmo.*
70. *Donatio mortis causa.*
71 Trusts created by Precatory Words.
72. Doctrine on this subject in England; in the United States generally; in Pennsylvania and Connecticut.
73. What precatory words will create a trust.
74. Such words *prima facie* imperative.
75. Certainty of the object is an element for consideration.
76. Certainty of the Subject.
77. Powers in Trust; *Salusbury* v. *Denton.*

CHAPTER III.

IMPLIED TRUSTS.

78. Implied Trusts of two kinds: Resulting Trusts and Constructive Trusts.
79. Resulting Trusts of four kinds.
80. Purchase-money paid by one; title taken in name of another.
81 Requisites to such a trust.
82 Statute of Frauds.
83. Parol evidence admissible.
84. Advancements.
85. Trusts of this kind abolished in certain States.
86. Purchases by Trustees with trust funds.
87. Conveyance where trust is not declared or fails.
88. Where the beneficial interest is not exhausted.
89. Exceptions in favor of charities.
90. Conveyances without consideration.
91. Constructive trusts.
92. Trustee cannot acquire rights antagonistic to *cestui que trust.*
93. Extent of this rule.
94. Trustee cannot purchase at his own sale.
95. Other Constructive Trusts.

CHAPTER IV.

TRUSTS FOR MARRIED WOMEN.

96. Rights of Husband at common law in wife's property.
97. Statutory changes.
98. Creation of trusts for sole and separate use.
99. Trustee not necessary.
100. No particular words necessary.
101. Power of married woman over separate estate.
102. Liability of separate estate to her engagements; *Johnson* v. *Gallagher.*
103. Rules in the United States upon this subject.
104. Restraints on anticipation.
105. For whose benefit separate estates may be created; *Massey* v. *Parker; Tullett* v. *Armstrong.*
106. Rules in the United States on this subject.
107. General conclusions; Lewin's propositions.
108. Pin-money trusts.
109. Wife's equity to a settlement.
110. How enforced.
111. How waived.
112. To what property it attaches.
113. Against whom, and in whose favor.
114. Gifts from husband to wife; contracts.
115. Contracts for separation.

CHAPTER V.

TRUSTS FOR CHARITIES.

116. Uncertainty in the object a characteristic of a charitable use.
117. Importance of charitable uses.
118. Origin of charitable uses; *Vidal* v. *Girard's Executors*.
119. Statute of Elizabeth.
120. Classification of charitable gifts; Gifts for eleemosynary purposes.
121. Gifts for educational purposes.
122. Gifts for religious purposes.
123. Gifts for public purposes.
124. Definition of a charitable use; Mr. Binney's definition; *Jackson* v. *Phillips*.
125. Characteristics of a charitable use; uncertainty of the object.
126. The *Cy pres* doctrine.
127. *Jackson* v. *Phillips*.
128. *Cy pres* doctrine in England, prerogative and judicial.
129. Soundness of the latter doctrine
130. Rules of the different States.
131. Nature of the uncertainty which should avoid a charitable gift.
132. Resulting trusts in cases of charitable gifts; *Thetford School Case*.
133. Perpetuities and Accumulations.
134. Statutes of Mortmain.

CHAPTER VI.

TRUSTEES; THEIR POWERS AND DUTIES.

135. Jurisdiction of Courts of Equity over trustees.
136. Who may be a trustee; corporations.
137. Acceptance of the trust.
138. General duties of trustees.
139. Conversion of securities; deposits.
140. Investments by trustees; English rule.
141. Rules in the United States.
142. When trustees are chargeable with interest.
143. Trustee cannot use his position for his own advantage.
144. Compensation of trustees; difference between English rule and that in most of the United States.
145. Trustee cannot delegate his authority.
146. Responsibility for acts of co-trustee.
147. Remedies for breach of trust.
148. Trustees' Accounts.

CHAPTER VII.

MORTGAGES.

149. The law of Mortgages no longer peculiar to Equity.
150. Nature of a Mortgage; origin of Equity of Redemption.
151. Nature of the Equity of Redemption; limitations.
152. Nature of Mortgagor's title in England; in the United States.
153. Once a mortgage, always a mortgage.
154. Distinction between mortgages and conditional sales.
155. Absolute deed may be shown to be a mortgage.
156. Foreclosure suits
157. Rights and duties of mortgagor and mortgagee.
158. Tacking.
159. Mortgages to secure future advances.
160. Merger; sometimes prevented in Equity.
161. Equitable mortgages to be considered under Liens.

CHAPTER VIII.

ASSIGNMENTS.

162. Common-law rule forbidding assignment of *choses in action*.
163. Exceptions.
164. Such assignments allowed in equity.
165. Assignments of future property; *Holroyd* v. *Marshall*.
166. Exceptions to the general rule.
167. Requisites to an equitable assignment.
168. When notice of assignment necessary; to whom given.
169. Authorities in the United States conflicting.
170. Effect of equitable assignments; assignment is subject to equities between original parties.
171. Whether assignment is subject to equities of third parties.
172. Rights of action of the assignee at law; in equity.
173. Liability to be sued cannot be transferred; exceptions.

PART II.

EQUITABLE RIGHTS.

CHAPTER I.

ACCIDENT AND MISTAKE.

174. Definition of Accident.
175. Limitations upon the relief afforded in equity.
176. Cases in which relief will be afforded.
177. Lost instruments; advantages of remedy in equity.
178. Penalties.
179. Liquidated damages.
180. Agreements for reduction of debt.
181. Forfeitures.
182. Defective execution of powers.
183. Miscellaneous cases.
184. Equitable remedies in cases of Mistake.
185. Definition of Mistake.
186. Mistakes of two kinds—of Law and of Fact.
187. Mistakes of Law; *Hunt* v. *Rousmaniere*.
188. Misrepresentation and Surprise.
189. Compromises of doubtful rights; family arrangements.
190. Mistakes of Fact; different kinds.
191. Must be mutual, material, and not induced by negligence.
192. Defective execution of powers.
193. What defects may be remedied.
194. For whose benefit.
195. Against whom.
196. Miscellaneous cases.

CHAPTER II.

FRAUD.

SECTION I.

GENERAL NATURE OF FRAUD; ACTUAL FRAUD.

197. Importance and general nature of equitable jurisdiction in cases of Fraud.
198. Distinctions between the relief at law and in equity.
199. Limitations upon the jurisdiction of equity in cases of Fraud; Fraud in obtaining a will; *Allen* v. *M'Pherson.*
200. Concurrent jurisdiction of equity.
201. Exclusive jurisdiction.
202. Fraudulent transactions voidable, not absolutely void.
203. Within what time redress must be sought.
204. Fraudulent transactions must be adopted or set aside *in toto.*
205. General division of the subject of Fraud.
206. General nature of actual fraud.
207. Matters of opinion.
208. Prospectuses of projected companies; *Central Railway Co.* v. *Kisch.*
209. Puffing; *Mortimer* v. *Bell.*
210. Fraud on owner of property sold at auction.
211. Matters of intention.
212. Matters of law.
213. *Suppressio veri.*
214. Knowledge of the truth or falsehood by party making the representations; classification of cases on this subject.
215. Representation must be relied on.
216. Representation must be material; *dolus dans locum contractui.*
217. Party deceived must be injured; representations by agents.
218. Trustees *ex maleficio.*

SECTION II.

FRAUD ARISING FROM THE INTRINSIC NATURE OF THE TRANSACTION.

219. Contracts void by reason of their terms; Inadequacy of consideration.
220. Bargains by reversioners and expectant heirs.
221. Change of the law in England.
222. Usurious contracts.
223. Gambling contracts.
224. Contracts void by reason of their subject-matter; *Ex turpi causa non oritur actio.*
225. Gifts in restraint of marriage; rule of the Roman Law.
226. Conditions in general restraint of marriage.
227. Conditions in partial restraint.
228. Contracts in restraint of trade.
229. Sales of public offices.

SECTION III.

FRAUD PRESUMED FROM THE RELATIONS OF THE PARTIES.

230. Mental disability; drunkenness; *duress.*
231. Undue influence; gifts; *Huguenin* v. *Baseley.*
232. Contracts; *Tate* v. *Williamson.*
233. Parties between whom confidential relation ordinarily exists.
234. Guardian and ward.
235. Parent and child.
236. Solicitor and client.
237. Trustee and *cestui que trust.*
238. Fiduciary can make no profit; *Bank* v. *Tyrrell.*
239. Promoters of companies.

SECTION IV.

FRAUD AFFECTING THIRD PARTIES; GENERAL RULES AS TO FRAUD.

240. Subdivisions of frauds of this class; fraud upon creditors.
241. Statute 13 Elizabeth, c. 5.
242. Jurisdiction of equity in cases under the statute.
243. Conveyance must be for a good consideration, and *bona fide*.
244. Moral obligations; consideration of marriage.
245. Voluntary transfers; conveyances by persons indebted.
246. Conveyances of property which could not be reached by execution.
247. Gifts from husband to wife.
248. Parties by whom fraudulent conveyances may be avoided.
249. Secret agreements touching composition deeds.
250. Fraud upon subsequent purchasers; Statute 27 Eliz., c. 4.
251. Difference between the English and American rules.
252. Statute not applicable to personal chattels.
253. Fraud on marital rights; *Strathmore* v. *Bowes*.
254. Ignorance of the husband as to the existence of property immaterial.
255. Circumstances which constitute fraud on marital rights.
256. Fraud on powers; *Aleyn* v. *Belchier*.
257. Appointment must be made solely to carry out the purpose of the power; *Topham* v. *The Duke of Portland*.
258. Admissibility of parol evidence to vary or contradict written instruments in cases of fraud; *Woolham* v. *Hearn*; *Gillespie* v. *Moon*.
259. How the right to impeach a fraudulent transaction may be lost; confirmation; release; acquiescence.
260. Delay; *bona fide* purchasers for value.

CHAPTER III.

NOTICE.

261. Doctrine of notice not applicable to contests between purely legal titles.
262. Applicable to equitable titles; *Le Neve* v. *Le Neve*.
263. Illustrations of the doctrine.
264. Parties by whom want of notice may be set up. Rules on this subject.
265. Extent of protection afforded by want of notice.
266. English rule that payment of purchase-money and acquisition of legal title must both precede notice.
267. Rule in United States; protection *pro tanto*.
268. Notice actual and constructive; actual notice either direct or presumptive.
269. Constructive notice; Vice-Chancellor Wigram's division.
270. Notice by registration.
271. What registration will operate as notice.
272. Effect of actual notice of unregistered conveyance.
273. Constructive notice of same.
274. Lis Pendens.
275. Plea of *bona fide* purchaser for value.

276. Can be used by the holder of an equitable title.
277. Doctrine of seeing to the application of purchase-money.
278. Abolished in England.
279. Of little importance in the United States.

CHAPTER IV.

EQUITABLE ESTOPPEL; ELECTION.

280. Definition of estoppel.
281. Different kinds of estoppel; legal estoppels *in pais*.
282. Equitable estoppel or estoppel by conduct; founded on fraud.
283. A party may be estopped by the assertion of an untruth. *Congregation* v. *Williams*.
284. A party may be estopped by the concealment of the truth. *Pickard* v. *Sears*.
285. Conduct which works an estoppel must be external to the contract.
286. Representations between party alleging estoppel and party estopped.
287. Representations between party alleging estoppel and third party.
288. Representations must be known to be false by party making them.
289. Must operate to deceive the party to whom they are made.
290. Intention that conduct should be acted on must exist.
291. Estoppel must be actually produced by the conduct.
292. Estoppel is limited to the representations made.
293. Estoppels in the cases of married women and infants.
294. Estoppels bind parties and privies.
295. Election; definition and example.
296. Of two kinds; expressed and implied.
297. Importance of the distinction between the two.
298. Circumstances under which the doctrine of election arises; illustrations.
299. After-acquired lands.
300. Powers.
301. Donor must give property of his own.
302. Property of the donee must be also given.
303. Gifts must be by the same instrument.
304. Manner in which election may be made.
305. Consequence of an election is compensation, not forfeiture.
306. Application of doctrine of election to case of creditors.

CHAPTER V.

CONVERSION AND RECONVERSION.

307. General nature and extent of equitable conversion.
308. Example. *Fletcher* v. *Ashburner*.
309. Conversion may take place either under a trust or under a contract.
310. What language is necessary to effect a conversion.
311. In what ways a trust to convert may be made imperative.
312. Question of conversion one of intention.
313. Contract, to work a conversion, must be binding.
314. General results of a conversion; qualifications.
315. Failure of the purposes of a conversion; resulting trust.
316. *Ackroyd* v. *Smithson*, *Smith* v. *Claxton*.
317. Conversion "out and out."

318. Doctrine in the United States on this subject.
319. Conversion under instruments *inter vivos*.
320. Time from which a conversion takes place.
321. Conversion under optional contracts.
322. Reconversion may be by act of party or by act of law.
323. Election to reconvert may be either by express declaration, or by acts.
324. By whom such election may be made.
325. Reconversion by operation of law

CHAPTER VI.

ADJUSTMENT.

326. Equities to be considered under Adjustment; Set-off, Contribution, Exoneration, Subrogation, and Marshalling.
327. Set-off.
328. Contribution; application most frequent in case of sureties.
329. No contribution originally enforceable at law; advantages of equitable proceeding.
330. General rules as to right of contribution.
331. Exoneration; not originally enforceable at law.
332. Cases in which these equities are usually applied.
333. Sales of different parcels of mortgaged land to successive purchasers.
334. General average.
335. Subrogation; nature of the right.
336. Judgment may be kept alive after it is paid, in order to protect equities.
337. Extent of the doctrine of subrogation.
338. Qualifications.
339. Surety can compel a creditor to make a prompt use of his remedies.
340. Marshalling.
341. Usually enforced through the medium of subrogation.
342. How the equity of marshalling is sometimes qualified.
343. Its application in cases of bankruptcy.
344. Cases in which this equity is usually applied in the United States. Doctrine in *Fosdick* v. *Schall*.
345. Marshalling as applied to estates of decedents.
346. Order in which assets of a decedent are applied to the payment of his debts.
347. How the general personalty may be exonerated.
348. Exoneration by implication.
349. When realty and personalty contribute *pro rata*.
350. Assets will not be marshalled in favor of a charity.

CHAPTER VII.

LIENS.

351. Distinction between liens at common law and in equity.
352. Instances of equitable liens.
353. Vendor's lien for purchase-money.
354. Nature of this lien.
355. Waived by taking independent security.
356. Parties for and against whom the lien exists.
357. Deposit of title deeds.
358. Mortgages of personalty.
359. Pledges.
360. Liens in aid of equitable and legal rights.

PART III.

EQUITABLE REMEDIES.

CHAPTER I.

SPECIFIC PERFORMANCE.

361. General nature of this equitable remedy.
362. Inadequacy of common-law remedies.
363. Other grounds of the superiority of the remedy in equity.
364. Contracts for the sale of real estate.
365. May be enforced between original parties, and those who claim under them.
366. May be enforced as to real estate outside of the jurisdiction.
367. Covenants for further assurance.
368. Personal property.
369. When damages cannot be ascertained.
370. Other contracts.
371. Specific performance rests in discretion of the court.
372. Contract must be founded on a valuable consideration.
373. Meritorious considerations.
374. Adequacy.
375. Performance in specie must be necessary.
376. Must be in accordance with general equitable doctrines.
377. Contract must be mutual, certain, and practicable.
378. Purchaser not compellable to accept a doubtful title.
379. *Pyrke* v. *Waddingham.*
380. Other rules as to title.
381. Parol variations of written contracts; *Townshend* v. *Stangroom.*
382. Authorities in the United States.
383. Statute of Frauds; exceptions.
384. Part performance.
385. What constitutes part performance.
386. When the reduction of the contract to writing is prevented by fraud.
387. When the parol contract is admitted in the answer.
388. Specific performance with compensation for defects.
389. When the purchaser may be compelled to take.
390. When he may elect to take; limitations upon this doctrine.
391. Time to make out a title beyond the day.
392. Due diligence required.
393. Rule altered by express stipulations, or by presumptions growing out of the nature of the contract.
394. Surrounding circumstances.
395. Compensation; *Sir Hugh Cairns's Act.*
396. Doctrine in the United States.
397. Parties compelled to make good their representations.
398. Enforcing negative covenants.

CHAPTER II.

INJUNCTIONS.

SECTION I.

GENERAL NATURE OF INJUNCTIONS; INJUNCTIONS TO RESTRAIN INFRINGEMENT OF EQUITABLE RIGHTS; AND HEREIN OF INJUNCTIONS TO RESTRAIN PROCEEDINGS AT LAW; OF BILLS OF PEACE; AND OF BILLS OF INTERPLEADER.

399. Definition of an injunction.
400. Injunctions either mandatory or prohibitory; mandatory injunctions.
401. Prohibitory injunctions.
402. Character of the equitable remedy by injunction.
403. Classification of injunctions; interlocutory and perpetual.
404. Ex parte, or at the hearing.
405. Common, or special.
406. General division of the subject of injunctions.
407. Injunctions to restain proceedings at law; *Earl of Oxford's Case.*
408. Not in the nature of Writs of Prohibition.
409. General nature of this jurisdiction.
410. General extent of this jurisdiction; equitable titles protected.
411. Equitable rights protected.
412. Equitable remedies assisted.
413. Injunctions to prevent vexatious litigation; election between remedies.
414. Injunctions after the court has assumed jurisdiction of a cause.
415. Bills of Peace, two classes; assertion of a common right.
416. *Sheffield Water Works* v. *Yeomans.*
417. General rules as to Bills of Peace of the first class; *Phillips* v. *Hudson.*
418. Bills of Peace of the second class.
419. Bills of Interpleader.
420. Bills must show title in two claimants.
421. Complainants must claim no interest.
422. Debt or duty must be the same.
423. Injunctions in aid of proceedings in Bankruptcy.
424. In what courts proceedings will be restrained.
425. Injunctions in cases of trusts and mortgages.
426. Injunctions between partners.
427. Restraint of disclosure of confidential communications.

SECTION II.

INJUNCTIONS TO PROTECT LEGAL RIGHTS.

428. Classification of cases in which Injunctions issue to protect legal rights.
429. Waste.
430. Common-law remedies; their defects.
431. Reasons for remedy in equity.
432. Nature of Waste.
433. Parties who will be restrained from committing waste.
434. Equitable Waste.
435. Destructive Trespass; origin of jurisdiction in such cases.
436. Subdivision of the subject.
437. Public Companies; restrained from improperly taking land.

438. Nuisance.
439. Remedies at common law; their defects.
440. How far complainant's title at law must be established.
441. Different kinds of nuisance.
442. Coming to a nuisance.
443. Lateral support to soil; Purprestures; Public Companies.
444. Injunction in cases of Patent Right; Copyright; and Literary Property.
445. Inspection.
446. Injunction.
447. Account.
448. Patent Right
449. Previous trial at law to establish right unnecessary.
450. Copyright.
451. Copyright.
452. Piracy, what it is.
453. Other requisites to an Injunction.
454. Literary Property; *Prince Albert* v. *Strange*.
455. Questions as to publication.
456. Trade-marks.
457. What are trade-marks.
458. Diligence; colorable imitations.
459. Alienation of negotiable securities.
460 Alienation pending litigation.
461. Breach of negative covenants.
462. *Lumley* v. *Wagner*.
463. Instances of covenants which have been restrained.
464. Negative quality imported into affirmative covenants.
465. Injunctions in cases of Corporations.

CHAPTER III.

RE-EXECUTION, REFORMATION, RESCISSION AND CANCELLATION.

466. Reason for the existence of these equitable remedies.
467. Re-execution.
468. Reformation.
469. General principles in such cases.
470. Admissibility of parol evidence.
471. Reformation under presumption of law.
472. Rescission; voidable contracts, how far good.
473. Cancellation as applied in the rescission of voidable contracts.
474. Cancellation independent of rescission.
475. Relief by rescission and cancellation a matter of judicial discretion.
476. Compensation.
477. Rule in England; Sir Hugh Cairns's Act.
478. No uniform rule on this subject in the United States.

CHAPTER IV.

ACCOUNT; PARTITION; DOWER; BOUNDARIES; RENT.

479. General nature of the right to an account.
480. Bills for Account.
481. Inadequacy of the common-law remedies.
482. Origin of the remedy in equity.
483. Limitations upon this remedy.
484. Extent of the remedy.
485. Plea of stated account.
486. Leave to surcharge and falsify.
487. Partition; origin of jurisdiction of chancery.
488. Disadvantages of proceeding at common law; changes by statute in the United States.
489. Advantages of mode of procedure in equity.

490. Mode of making partition in equity.
491. Difficulties of making partition no objection to a decree.
492. Power to award owelty.
493. Power to order a sale.
494. Nature of Dower.
495. Remedy by bill in equity.
496. Disadvantages of the proceeding at common law.
497. Advantages of the procedure in equity.
498. Account of mesne profits.
499. Multiplicity of suits avoided.
500. Dower out of equitable estates.
501. General conclusions as to equitable jurisdiction.
502. Manner of assigning dower.
503. Jurisdiction of equity in cases of Confusion of Boundaries.
504. In cases of Rent.

CHAPTER V.

PARTNERSHIP BILLS.

505. Reasons for resorting to equity in partnership cases.
506. Nature of the contract of partnership.
507. Many equitable remedies applied to partnership cases.
508. Peculiar remedy by Partnership Bills; Bills for account need not pray a dissolution.
509. Causes of dissolution; Grounds for bills for dissolution.
510. Preservation of partnership property.
511. Doctrine of conversion as applied to partnership real estate; rule in England.
512. Rule in the United States.
513. Qualifications of the rule.
514. Sale and account.
515. Winding-up partnerships; joint and separate debts.
516. Separate assets of deceased partner applied in the first instance to payment of separate debts.
517. Extension of this doctrine; English rule.
518. Rule in *Tucker* v. *Oxley*.
519. Bankrupt Act of 1867.
520. Method in which joint creditors may collect their debts.
521. Remedies of separate creditors.
522. Joint and separate executions.
523. Suits between firms having a common member.
524. Mines.

CHAPTER VI.

CREDITORS' BILLS AND ADMINISTRATION SUITS.

525. Creditors' Bills; are of two classes.
526. Creditors' Bills against a debtor during lifetime; inefficiency of common-law executions.
527. Nature and effect of the Equitable remedy.
528. Creditors' Bills of the second class. Administration suits.
529. Not of great importance in this country.
530. General course of proceeding in an administration suit.
531. Equitable Assets; doctrine of comparatively little importance.
532. Origin of the doctrine.
533. *Silk* v. *Prime*.
534. *Cook* v. *Gregson*.
535. Doctrine of Performance.
536. Covenant to settle, and subsequent purchase.
537. Covenant to pay, and subsequent intestacy.
538. Satisfaction; of debts by legacies.
539. Of legacies by legacies.
540. Of legacies by portions; of portions by legacies.

CHAPTER VII.

INFANTS, IDIOTS AND LUNATICS.

541. Protection afforded to the persons and estates of infants at common law, and by statute.
542. Necessity for, and origin of the jurisdiction of the chancellor.
543. Infant is made a ward of court.
544. To be made a ward of court the infant must have property.
545. Proceedings may be by petition as well as by bill.
546. Appointment and removal of guardians; custody of infants.
547. Guardianship a father's *duty*, not a *privilege*.
548. Education of the ward.
549. Management of his estate.
550. Marriage of the ward.
551. Nature and origin of the jurisdiction of the chancellor over lunatics and idiots.
552. Statute of Edward II.
553. Subject generally regulated by statute in the United States.
554. Method of procedure in lunacy.
555. Appointment and powers of committee.

CHAPTER VIII.

DISCOVERY.

556. Defects in common law as to discovery; statutory changes.
557. Origin and nature of bills of discovery.
558. Subject not of as much importance as formerly.
559. Discovery must be in aid of legal proceedings.
560. General rights of complainant in bills of discovery.
561. Rules for protection of defendant; need not discover his own title or evidence thereof.
562. Need not criminate himself
563. Confidential communications as to litigation.
564. State secrets.
565. In bills of discovery courts will go on and afford relief.
566. Production of documents.
567. Commissions to examine witnesses abroad; to take testimony *de bene esse*.

CHAPTER IX.

BILLS QUIA TIMET; RECEIVERS; WRITS OF NE EXEAT; AND OF SUPPLICAVIT.

568. Bills *Quia Timet;* their general nature.
569. Examples.
570. Personal property limited for life with remainders over.
571. Courts of equity will not entertain bills solely to *declare* rights.
572. Will not interfere in certain cases of covenants.
573. Bills to perpetuate testimony.
574. Bills to establish wills.
575. Bills to remove a cloud from title.
576. Receivers; general nature of the jurisdiction.
577. Appointment a matter of discretion; rules under which the discretion is exercised.
578. Cases in which a receiver will be appointed.
579. Effect of appointment.
580. Powers and duties of a receiver.
581. Writs of *Ne Exeat.*
582. Writs of *Supplicavit.*
583. Progressive capacity of Equity Jurisprudence.

TABLE OF CASES.

[The References are to the Sections.]

A.

Abbey *v.* Dewey 217
Abbott's Appeal 511
Abbott *v.* Rubber Company 145
Aberman Iron Works *v.* Wickens 356, 477
Aberdeen Town Council *v.* Aberdeen University 143
Abernethy *v.* Hutchinson 455
Abraham *v.* Newcombe 111
Abrams *v.* Seale 284
Academy *v.* Clemens 130
Acheson *v.* Miller 332
Acker *v.* Phœnix 66
Ackerman *v.* Emott 141
Ackroyd *v.* Smithson, 88, 315, 316, 317
Acton *v.* Dooley 282, 284
v. Woodgate 68
Adair *v.* Winchester 172
Adam *v.* Cole 119
Adams *v.* Adams 66, 67, 119, 155, 582
v. Barrett 223
v. Brackett 349
v. Dixon 528, 529
v. Guerard 55
v. Mackay 103
v. Soule 207
Aday *v.* Echols 377, 478
Addams *v.* Tutton 505
Adderley *v.* Dixon 369, 375
Addison *v.* Bowie 304
Adlington *v.* Cann 65
Adlum *v.* Yard 306
Adsit *v.* Adsit 298
Adye *v.* Feuilleteau 141
v. Smith 119
Afee *v.* Ferguson 253
Affleck *v.* Affleck 194
Aflalo *v.* Fourdrinier 337
Agar *v.* Fairfax 489, 490, 491, 493, 501
v. Murray 527
Agnew *v.* Bell 329, 335
v. Fetterman 534
Agra Bank *v.* Barry 273
Agra & Masterman's Bank, In re 170, 294
Agricultural Bank *v.* Pallen 333, 341
Aguilar *v.* Aguilar 331
Ahearne *v.* Hogan 237
Ahrend *v.* Odiorne 353
Aiken *v.* Gale 333
v. Suttle 575
Aiman *v.* Stout 230
Ainslie *v.* Boynton 327
Ainsworth *v.* Walmsley 456
Aiken *v.* Smith 55
Akerly *v.* Vilas 202
Albany Ins. Co. *v.* Bay 103
Albea *v.* Griffin 385
Albergottie *v.* Chapin 489
Albert *v.* The City of Baltimore 263
v. The Savings Bank 263
Albert (Prince) *v.* Strange 454
Albright *v.* Herzog 527
v. Oyster 408
Alden's Appeal 37
Alderson, Ex parte 167
Aldred's Case 441
Aldrich *v.* Cooper 333, 340, 341, 342, 343, 346, 347, 350
v. Hapgood 335
Aldridge *v.* Dunn 356
v. Thompson 422
Alexander *v.* Crosbie 469
v. Ellison 283
v. Fisher 432
v. Pendleton 575
v. Warram 84
Aleyn *v.* Belchier 256
Allan *v.* Gott 349
Allegheny Base Ball Club *v.* Bennett 462
Allen's Estate 885
Allen, Ex parte 230
Allen, In re 273
Allen *v.* Anthony 268
v. Barkeley 487
v. Berry 42
v. Board of Freeholders 443

Allen *v.* Centre Valley Company 515
v. Chambers 64, 385
v. Clark 333
v. Dermott 336
v. Everley 151
v. Hart 214
v. Imlett 52
v. Jackson 227
v. Lathrop 159
v. McPherson 198, 199
v. Montgomery 527
v. Seckham 268
v. Wells 516
v. Wood 328
Alliance Bank, Ex parte, The 351
Allin *v.* Millison 207
Allis *v.* Billings 230
Allison & Evans's Appeal 436, 478
Allison *v.* Herring 484
v. Wilson 307
Allore *v.* Jewett 203, 230, 260
Allsopp *v.* Wheatcroft 228
Almond *v.* Almond 113
Almony *v.* Hicks 575
Almy *v.* Reed 177
Alsop *v.* Eckles 575
Alston, Ex parte 360
Alsworth *v.* Cordtz 83
Alto Carbon Light Co. *v.* Crystal Carbon Light Co. 466
Ambrose *v.* Ambrose 64
Ambrouse's Heirs *v.* Keller 365, 374
American Bridge Co. *v.* Heidelbach 157
Ammon's Appeal 245, 247
Amoskeag Manufacturing Company *v.* Spear 457
Amphlett *v.* Parke 317
Ancaster (Duke of) *v.* Mayer 332, 346, 347, 348
Anderson's Appeal 304
Anderson's Case 239
Anderson *v.* Abbott 295
v. Anderson 509
v. Arrington 37
v. Burwell 203
v. Chick 385
v. Greble 332
v. Harvey 435, 436
v. Lemon 93
v. Neff 158
v. Noble 412, 484
Anding *v.* Davis 63
Andrews, Matter of 542
v. Andrews 133
v. Bell 376
v. Brown 390, 395, 478
v. Hobson 66
v. Jones 110, 234
Andrews *v.* McCoy 170
v. Salt 548
v. Solomon 563
Anewalt's Appeal 310
Angel *v.* Hadden 422
Angell *v.* Angell 573
Anketel *v.* Converse 353, 355
Annan *v.* Merrit 385
Annapolis R. R. Co. *v.* Gantt 151
Anonymous 151, 424, 509, 546, 578
Anthony *v.* Rogers 157
Apgar *v.* Hiler 330
Appeals of City of Philadelphia 166
Apperson *v.* Moore 165
Apple *v.* Allen 106
Appleton *v.* Rowley 60
Arbuthnot *v.* Norton 166
Archer *v.* Hudson 235
v. Rorke 100
Arden *v.* Patterson 156
Ardesco Oil Co. *v.* N. A. Mining Co. 331
Arglasse *v.* Muschamp 47
Arkenden *v.* Starkey 8
Arlin *v.* Brown 353
Armitage *v.* Pulver 330
v. Wadsworth 174
Armstrong *v.* Gilchrist 37, 484
v. Morrill 137
v. Ross 103, 353
Arna's Appeal 341
Arnold *v.* Gilbert 307
v. Klepper 440
Arnot *v.* Pittston & Elmira Coal Co. 228
Arques *v.* Wasson 165
Arquello *v.* Edinger 385
Ash's Appeal 55
Ashburton *v.* Ashburton 549
Ashcraft *v.* Little 100
Ashe *v.* Johnson 368
Asher *v.* Pendleton 179
Ashhurst's Appeal 55, 61, 260
Ashhurst *v.* Given 55, 61
Ashley *v.* Palmer 314, 324
Ashton's Appeal 265
Ashton *v.* Thompson 231
Ashuelot R. R. Co. *v.* Elliott 92
Askins *v.* Coe 291
Aspenden *v.* Seddon 37
Astel *v.* Causton 8, 401
Astor *v.* Wells 268, 271
Astreen *v.* Flanagan 84
Athey *v.* Knotts 242
Atkins *v.* Kron 60
Atkinson *v.* Marks 422
Atlanta, City of, *v.* Gate City Gas Co. 424
Atlantic Delaine Co. *v.* James 475

Atlantic Delaine Co. *v.* Tredick 407
Att.-Gen. *v.* Andrew 122
v. Baliol College 126, 128
v. Blizard 120
v. Borough of Birmingham 400
v. Bowyer 121
v. Bradford Canal 439
v. Briant 564
v. Brunning 309
v. Craven 128
v. Crofts 151
v. Dean of Windsor 132
v. Doughty 441
v. Gibson 128
v. Gladstone 122
v. Glasgow College 126, 128
v. Guise 126, 128
v. Haberdasher's Co. 119
v. Heelis 119, 123
v. Hicks 128
v. Ironmongers' College 120, 126, 128
v. Kell 120
v. Matthews 120
v. Merrimack Manuf. Co. 65
v. Metropolitan Board of Works 400
v. Mid. Kent Ry. Co. 400
v. Moor's Executors 130
v. Oakaver 119
v. Old South Society 120
v. Pearson 119
v. Ruper 119
v. Sands 52, 60
v. Sheffield Gas Co. 465
v. Soule 131
v. Stephens 503
v. Stepney 122
v. Utica Ins. Co. 443
v. Wallace 122
v. Wax Chandlers' Co. 132
v. William and Mary's College 119, 122
Attwood *v.* Banks 424
v. Coe 462
v. Small 215
Atwell *v.* Atwell 311
Atwood *v.* Vincent 336
Aubin *v.* Holt 507
Audenreid *v.* Philadelphia & Reading R. R. Co. 400
Austen *v.* Halsey 356
v. Taylor, 55, 57
Austin *v.* Austin 548
Austria (Emperor of) *v.* Day 456
Auter *v.* Miller 571
Aveling *v.* Knipe 81
Averill *v.* Loucks 518
Avery *v.* Ware 483
Ayciena *v.* Peries 37
Ayer *v.* Ayer 99
Ayerst *v.* Jenkins 260
Aylesford (Earl of) *v.* Morris 220, 221, 222
Aymar *v.* Roff 542
Aynesly *v.* Glover 441
Aynesworth *v.* Haldeman 65
Aynsly *v.* Reed 151
Ayres *v.* Husted 342
v. Waite 151
v. Wattson 291, 360

B.

Babb *v.* Reed 119
Babcock *v.* Case 214
v. Day 472
v. Emrich 376
v. Lisk 269
v. Wyman 155
Backhouse *v.* Patton 534
Backler *v.* Farrow 492
Backus's Appeal 376
Bacon's Appeal 55, 57, 575
Bacon *v.* Bronson 198, 200
v. Crosby 298
v. Ransom 74
v. Taylor 55
Baden *v.* Countess of Pembroke 365
Badger *v.* Badger 39 202
Badgley *v.* Bruce 495, 501
Baggarly *v.* Gaither 264
Bagnall *v.* Carlton 238
Bagshaw *v.* Seymour 207, 208
v. Spencer 57
Bagster *v.* Fackerell 316
Bahia and San Francisco R. R. Co., In re 290
Bailey *v.* Brownfield 336, 337
v. Carter 151
v. Coal Co. 239
v. Pearson 103
v. Richardson 268
v. Ryder 366
v. Sisson 487, 489
Baillie *v.* Baillie 424
Bair & Shenk's Appeal 343
Baird *v.* Baird 274
v. Stearne 255
Bailey *v.* Allegheny Nat. Bank 323
Baker *v.* Backus 576
v. Biddle 486
v. Bradley 235
v. Gray 158
v. Johnson 291
v. Leathers 84
v. Lever 472

Baker *v.* Monk 230
v. Morgans 409
v. Sebright 434
v. Vining 81, 83
v. White 224
v. Whiting 93
v. Williamson 9, 56
Bakewell *v.* Keller 527
Balbec *v.* Donaldson 83
Baldwin *v.* Campfield 82, 83, 90
v. Johnson 86
v. Kerlin 377
v. Rochford 221
v. Salter 380
v. Van Voist 180
Baldy *v.* Brady 534
Bales *v.* Perry 284 289
Balis *v.* Hunt 188
Ball *v.* Ball 546
v. Oliver 578
Ball *v.* Montgomery 113
v. Ray 441
Ballance *v.* Underhill 184
Ballard *v.* Ballard 364
v. Jones 151
v. Taylor 100
Ballentine *v.* Harrison 436
Ballentine *v.* White 9, 155
Ballin *v.* Dillaye 103
Ballinger *v.* Edwards 222
Baltimore *v.* Porter 424
Baltimore Ass'n *v.* Caldwell 94
Bancroft *v.* Cousen 86, 270
Bank of Hindustan, In re 352
Bank *v.* Carrolton Railroad 521
v. Dubuque 143
v. Fordyce 170
v. Gerome 170
v. Rosevelt 151
of Columbia *v.* Hagner 391
of London *v.* Tyrrell 239
of Louisville *v.* Hall 512
of Macon *v.* Bartlett 258
of Mount Joy *v.* Gish 167
of Muskingum *v.* Carpenter 357
of Pennsylvania *v.* Potius 330
of United States *v.* Beverly 348
of United States *v.* Biddle 37, 203, 483
of United States *v.* Carrington 80, 83
of United States *v.* Daniel 189
of United States *v.* Housman 90
of United States *v.* Huth 167
of Utica *v.* Finch 159
of Westminster *v.* Whyte 470
Bankhead *v.* Alloway 214, 486
Banks *v.* Evans 474
v. Gibson 456
Baptist Association *v.* Hart's Executors 117, 118, 130, 136
Baptist Church *v.* Scannel 465
Barber, Ex parte 165
Barclay's Appeal 37
Bardwell *v.* Perry 516
Barefoot *v.* Fry 418
Barfield *v.* Nicholson 463
Bargent *v.* Thompson 181
Baring *v.* Dix 509
v. Nash 487
Barker, Matter of 551
Barker *v.* Binninger 291
v. Cox 390
v. Elkins 409
v. Vonsommer 222
Barkley *v.* Lane 64, 65
Barksdale *v.* Finney 143
Barley Wringing Machine Co. *v.* Sears 449
Barnard *v.* Bougard 80, 81
v. Campbell 281
v. Ford 110
v. Jennison 157
v. Jewett 82
v. Lee 392, 393
v. Nor. & Wor. R. R. Co. 165
Barnes *v.* Jones 578
v. Taylor 203
v. Wood 365
Barnet *v.* Dougherty 210
v. Turnpike Co. 175
Barnett's Appeal 55
Barnett *v.* Barnett 190
Barnewell *v.* Cowdor 347
Barney *v.* Grover 170
v. Saunders 141, 142
Barnhart *v.* Greenshields 268
Barny *v.* Beak 222
Baron de Worms *v.* Mellier 409
Barr *v.* Hatch 193
v. Weld 133
Barrell *v.* Joy 64
Barrett *v.* Blagrave 461
Barron *v.* Alexander 213
v. Barron 80, 86, 99, 110, 115
Barrow *v.* Barrow 99, 304
v. Rhinelander 222, 237, 486
v. Wadkin 60
Barr's Trusts, In re 168
Barrs *v.* Fewkes 88, 317
Barry *v.* Abbott 526
v. Ransom 330
Bartle *v.* Nutt 332
Bartlett *v.* King 122, 126
v. Pickersgill 80, 81
Barton's Appeal 139
Barto's Appeal 242
Basanquet *v.* Dashwood 223

Bascom *v.* Albertson 130, 133
Basingstock (Mayor of) *v.* Lord Bolton 504
Baskins *v.* Giles 99
Basset *v.* Nosworthy 40, 261, 263, 265, 266, 267
Bassett *v.* St. Albans Co. 527
Batchelder *v.* Sargent 103
Batchellor *v.* Lawrence 329
Bateman *v.* Fargason 42
Bates *v.* Conrow 151
v. Norcross 271
Bath (Earl of) *v.* Sherwin 418
Batstone *v.* Salter 84
Baugher *v.* Merryman 153
Baum *v.* Grigsby 355
Baxendale *v.* Seale 191
Baxter *v.* Moore 331
v. West 577
Bay *v.* Cook 527
Bayard *v.* Hoffman 246, 526, 527
v. Norris 268
v. The Farmers' Bank 263
Bayley *v.* Boulcott 65
v. Greenleaf 353, 356
Baylies *v.* Payson 571
Bayliss *v.* Williams 231
Bayspoole *v.* Collins 251
Beach *v.* Beach 115
v. Cooke 151
v. Shaw 151
Beall *v.* Fox 130
v. White 165
Beals *v.* See 230
Beans *v.* Bullitt 167
Bear *v.* Kœnigstein 80
Beardsley *v.* Knight 196
v. Morgan 166
Beasley *v.* Allyn 368
Beatty *v.* Byers 322, 323
v. Clark 194
Beauchamp *v.* Winn 187
Beauclerk *v.* Mead 320
Beaufort (Duke of) *v.* Berty 546, 578
v. Collier 100, 106
v. Glynn 412
v. Neeld 191
Beaumont *v.* Bramley 190
v. Carter 111
v. Meredith 119
v. Oliveira 123
Beaven *v.* Carpenter 573
v. Lord Oxford 168
Beaver *v.* Beaver 331
Bebee *v.* The Bank of New York 170
Beck *v.* Allison 377
v. Burdett 527
Beck *v.* Graybill 80
v. Kantorowicz 239
Beck *v.* Simmons 475
Beckford *v.* Beckford 84
v. Wade 38
Beckley *v.* Eckert 170
Beddon *v.* Beddon 371
Bedel *v.* Loomis 219
Bedell *v.* Hoffman 419
Bedford *v.* Bedford 317
Beecher *v.* Beecher 181
Beegle *v.* Wentz 91, 95, 198, 210, 218, 258
Beekman *v.* Bonsor 130
Beeman *v.* Courser 112
Beers *v.* Beers 258
v. Reynolds 485
v. Spooner 167
Bein *v.* Heath 405
Beioley *v.* Carter 378
Belcher *v.* Arnold 524
Belchier, Ex parte 145
Belding *v.* Read 165
Belfast (Steamboat) *v.* Born 212
Belfold *v.* Crane 84
Belknap *v.* Belknap 575
Bell *v.* Henderson 215
v. Hull and Selby Railway Co. 437
v. Jasper 330
v. Lawrence 189
v. Mayor of New York 157
v. Moon 260
v. Rawe 8
v. Thompson 390
v. Twilight 268
Bellamy *v.* Sabine 198, 204, 274
Bellas *v.* M'Carty 264, 267
Bellasis *v.* Compton 64
Belle *v.* Savage 8
Bellows *v.* Stone 382, 469
Belshaw *v.* Bush 337
Bemis *v.* Call 293
v. Upham 440
Benbow *v.* Townsend 64
Benedict *v.* Lynch 377, 392
v. Montgomery 114, 247
Benford *v.* Sauner 167
Benham *v.* Kean 272
v. Rowe 93
Benjamin *v.* Elmira R. R. Co. 165
Bennet *v.* Bennet 84
Bennett, Ex parte 239
Bennett *v.* Davis 99
v. Dillingham 113
v. Fulmer 65, 83
v. Ingoldsby 467
v. Judson 207, 214
v. Strait 293
v. Union Bank 154
v. Vade 199
Benning *v.* Benning's Executors 87

Bensell *v.* Chancellor 230
Benson *v.* Baldwin 504
v. Le Roy 532, 534
Bentley *v.* Mackay 189, 191
Beresford, Matter of 110
Bergen *v.* Udall 235
Berkley (Lord) *v.* The Countess of Shrewsbury 8
Bernal *v.* The Marquis of Donegal 581
Bernard *v.* Minshull 72, 74, 75
Berry *v.* Cross 509
v. The Church 341
v. Williamson 57
Berryhill's Appeal 144
Besant *v.* Wood 115
Bessey *v.* Windham 248
Best *v.* Hayes 419
v. Stowe 382
Bethell *v.* Sharp 210
Bethlehem Borough *v.* Perseverance Fire Co. 123
Bethune *v.* Wilkins 436
Bettle *v.* Wilson 115
Betts *v.* Burch 178
Beverley *v.* Brooke 576, 578
Bezzell *v.* White 329
Bibby *v.* Thompson 65
Bickel's Appeal 38, 80, 203
Bicknell *v.* Bicknell 357
Bickley *v.* Paul 527
Biddle's Appeal 74
Biddle *v.* Ash 446, 441
v. Moore 37
Bidwell *v.* City of Pittsburgh 290
Bief *v.* Dyer 8
Bierbower's Appeal 37, 484
Bierce *v.* The Red Bluff Hotel 268
Bigelow *v.* Barr 187
v. Hartford Bridge Co. 443
v. Willson 151
Bignold *v.* Audland 421
Bill *v.* Cureton 67, 68
Billings *v.* Sprague 535
Billingslea *v.* Ward 64
Billington *v.* Welsh 268
Binney *v.* Annan 370
Birch *v.* Ellames 269
Birdsey *v.* Butterfield 207
Birdwell *v.* Cain 94
Birkley *v.* Presgrave 334
Birmingham *v.* Kirwan 298
Bishop of Ely *v.* Kenrick 503
Bishop *v.* Banks 441
v. Breckles 509
v. Day 331
v. Reed 190
Bittenbender *v.* Sunbury & Erie R. R. 165
Bitting's Appeal 439
Bixby *v.* Eley 194
Black's Appeal 515, 518
Black *v.* Phila. & Reading R. R. 439
v. Shreeve 329
Blackburn *v.* Stables 57
Blackett *v.* Bates 377
v. Lamb 300, 303
Blackmore *v.* Shelby 234
Blackstone Bank *v.* Davies 61
Blackwilder *v.* Loveless 371
Blair *v.* Bass 83
v. Reading 409
v. Ward 333
Blake *v.* Exchange Ins. Co. 284, 286
v. Heyward 264
v. Langdon 327
Blakely *v.* Patrick 165
Blakeman *v.* Blakeman 258
Blakemore *v.* Glamorganshire Railway Co. 400
Blanchard *v.* Detroit, Lansing & Lake Mich. R. R 377
v. Hill 456
v. McDougal 385
v. Sheldon 66
v. Tyler 267
v. Williamson 203
Blanchet *v.* Foster 253, 255
Blandy *v.* Widmore 537
Blaney *v.* Bearce 151
Blauvelt *v.* Ackerman 81, 94, 143
Bleakley's Appeal 8, 33, 42
Bleight *v.* The Bank 310
Blenkinsopp *v.* Blenkinsopp 242
Blight's Heirs *v.* Banks 356
Blight *v.* Sckenck 145
Bliss *v.* American Bible Society 122
v. Smith 484
Blisset *v.* Daniel 507
Blodgett *v*, Hildreth 81, 83
Blondheim *v.* Moore 577
Bloomfield *v.* Stowmarket 128
Bludworth *v.* Lake 151
Blue *v.* Patterson 199
Blundell *v.* Brettargh 370
Blunt *v.* Patten 452
Blystone *v.* Blystone 42, 248
Boal *v.* Merguer 100
Board of Comm'rs Montgomery Co. *v.* Elston 43
Board of Public Works *v.* Columbia College 529
Boardman *v.* Catlett 151
v. Jackson 200
v. Meriden Britannia Co. 457
Bobb *v.* Woodman 37
Bodine *v.* Glading 180, 377
Boerum *v.* Schenck 94, 143

Bogert *v.* Hertell 312
Boggs *v.* Anderson 273
v. Chambers 487
v. Varner 271, 273
Bogut *v.* Coburn 151
Bohn *v.* Headley 252
Bold *v.* Hutchinson 58, 470
Bolling *v.* Bolling 486
Bollo *v.* Navarro 489
Bolton *v.* Bolton 489
Bonaparte *v.* Cam. & Amboy Rd. 437
Bond *v.* Bunting 67, 69
v. Insurance Company 69
v. Little 417
v. Nurse 52
Bonebright *v.* Pease 37
Bonesteel *v.* Sullivan 248
Bonner *v.* Bonner 110
v. Gr. West. Ry. Co. 400
Bonney *v.* Seeley 330
Bonodyn *v.* Arundell 8
Boone *v.* Boone 489
v. Chiles 264
Boos *v.* Ewing 355
Booten *v.* Scheffer 376
Booth *v.* Booth 146, 426
v. Clarke 576
v. Wylie 284
Bootle *v.* Blundell 347
Borah *v.* Archer 492
Borell *v.* Dann 374
Bostock *v.* North Stafford R. R. Co. 439
Boston Diatite Co. *v.* The Florence Manufacturing Co. 465
Boston Iron Company *v.* King 157
Bostwick, In the Matter of 549
v. Atkins 234
Botifeur *v.* Weyman 486
Botsford *v.* Beers 242, 526, 527
v. Burr 81, 82
Boughton *v.* Boughton 67, 349
Bourne *v.* Bourne 310
Bouslough *v.* Bouslough 248
Bouverie *v.* Prentice 503, 504
Bowditch *v.* Andrew 55
Bowe *v.* Bowe 235
Bowen *v.* Edwards 153
v. Hall 462
v. Hoskins 330
v. Seeger 145, 146
v. Matheson 228
Bowers *v.* Oyster 357
Bowie *v.* Stonestreet 478
Bowker *v.* Wells 73
Bowles *v.* Woodson 376
Bowling *v.* Bowling 570
Bowlby *v.* Thunder 72
Bowman *v.* Long 55
v. Wathen 268
Bowser *v.* Cessna 19
v. Colby 181
Box *v.* Barrett 298
Boxheimer *v.* Gunn 269
Boyce *v.* Burchard 510
Boyce's Ex'rs *v.* Grundy 13, 37, 200
Boyd *v.* Dunlap 220
v. McDonough 329
v. McLean 80, 83
Boykin *v.* Ciples 99
Boyle *v.* Tarner 13
Boylan *v.* Leonard 165
Boynton *v.* Boynton 304
v. Housler 210, 218
v. Hubbard 220, 224, 229
v. Rees 265
Boyton *v.* Payrow 359
Boyse *v.* Rossborough 230, 574
Brace *v.* The Duchess of Marlborough 159
Bracebridge *v.* Buckley 181
Bracken *v.* Miller 265, 268
Brackett *v.* Sears 159
Bradbury Nat. Bank *v.* Adams 61
Bradford Banking Co. *v.* Briggs 159
v. Greenway 103
v. Union Bank 382
Bradish *v.* Gibbs 114
Bradley *v.* George 333
v. Gill 441
v. Norton 456
Bradley's Case 167
Bradsher *v.* Lea 440
Brady *v.* Waldron 433
Brady's Appeal 230, 376
Bragg *v.* Paulk 64
Braham *v.* Bustard 456
Brainard *v.* Holsaple 475
Brandon *v.* Medley 189
v. Robinson 61
Brandreth *v.* Lance 453
Branham *v.* Record 217
Brant *v.* Mickel 100
Brantley *v.* West 83
Brashier *v.* Gratz 391
Bratton *v.* Rogers 268
Breard *v.* Munger 377
Breck *v.* Smith 581
Breckenridge *v.* Brooks 157
v. Ormsby 230
v. Taylor 328, 329, 330
Breden *v.* Gilliland 346
Brendle *v.* The German Reformed Congregation 123
Brest *v.* Yeaton 194
Bressler *v.* Kent 103
Breton *v.* Woodven 67
Brett *v.* Carter 165
Brew *v.* Van Deman 463

Brewer *v.* Boston, etc., R. R. Co. 288
v. Fleming 364
v. Herbert 175
v. Hyndman 151
Brice *v.* Brice 230
Bridesburg Manuf. Co.'s Appeal 421
Bridgeford *v.* Masonville Mf. Co. 177
Bridger's Case 287
Bridges *v.* Linder 154
v. Robinson 459
v. Wilkins 106
Bridgman *v.* Green 93, 239
Briggs *v.* Law 464
v. Light-boats 52
v. Penny 65, 72, 73, 75
v. The Planters' Bank 340
Bright *v.* Boyd 182
v. Bright 69
v. Legerton 147
v. Newland 37
Briley *v.* Sugg 336
Brinkerhoff *v.* Brinkerhoff 293
v. Brown 527
v. Marvin 159, 341
Bristow *v.* Whitmore 218
Bristowe *v.* Warde 301
Britain *v.* Rossiter 383
British Empire Shipping Co. *v.* Somes 35, 175, 558
Britton's Appeal 151
Britton *v.* Hill 436
v. Lewis 93
Broadwell *v.* Broadwell 187
Brobst *v.* Brock 152
Brock *v.* Barnes 231
v. Cook 385
Broddesworth *v.* Coke 8
Broder *v.* Saillard 441
Broderick's Will 199
Brodie *v.* Barry 297
Brogden *v.* Walker 230
Brolasky *v.* Gally's Executors 307
Bromley *v.* Holland 37, 177, 473
Bronson *v.* Cahill 377
Brook *v.* Badley 314
Brookfield *v.* Williams 492
Brooklyn White Lead Co. *v.* Masury 458
Brooks *v.* Curtis 287
v. Fowle 81
v. Hatch 164
v. Martin 42, 248
v. Norcross 449
v. Stolley 37
v. Wheelock 382, 387
Brooks's Will 72
Brothers *v.* Porter 81
Broun *v.* Kennedy 231
Brown *v.* Armistead 187
Brown *v.* Bateman 165
v. Bellows 180
v. Brown 65, 295, 376
v. Budd 271
v. Burbank 232
v. Caldwell 298
v. Clifford 155
v. Combs 65
v. Concord 130
v. County of Buena Vista 260
v. Cram 151
v. Desmond 366
v. Dysinger 210
v. Fish 527
v. Gaffney 153
v. Gilliland 368
v. Gilman 355
v. Hall 219
v. Hendrickson 327
v. Higgs 77
v. Holyoke 253
v. Hurde 409
v. Johnson 100
v. Jones 87
v. Leach 152, 215
v. Long 527
v. Lord Say's Widow 8
v. McDonald 528, 529
v. Meeting St. Baptist Soc. 133
v. Pitney 295
v. Pocock 77
v. Ray 335
v. Rice 212
v. Ricketts 139, 295
v. Runals 359
v. Simpson 353
v. Stewart 151, 575
v. Tanner 165
v. Vandegrift 181
v. Vandyke 485
v. Wabash Ry. Co. 47
v. Wales 561
v. Williamson's Ex'rs 61
v. Wright 140
Brown's Appeal 409, 440
Browne *v.* Trustees of Balt. Ch. 287
Brua's Appeal 223
Bruce, Ex parte 357
v. Burdet 484
v. Child 203
v. Edwards 339
v. Stokes 146
v. Tilson 392
Bruck *v.* Tucker 376
Brudenell *v.* Elwes 128
Bruff *v.* Mali 208
Bruner's Appeal 142, 340, 342
Bruner *v.* Meigs 37
Brunsden *v.* Woolridge 120

Brunson *v.* King 74
Bruton *v.* Rutland 489
Bryan *v.* Bradley 55
v. Bryan 110
v. Hitchcock 216
v. Long 409
v. Masterson 188
Bryar's Appeal 160
Brydges *v.* Brydges 10
Brymer *v.* Buchanan 422
Bryson *v.* Peak 391
Buchan *v.* Sumner 511, 512
Buchanan *v.* Gibbs 231
v. Hubbard 293
v. Marsh 459
v. Moore 283
v. Turner 103
Buck *v.* Adams 293
v. Holloway 273
v. Payne 151
v. Pike 80, 83
v. Smith 377
v. Swazey 167
Buckingham *v.* Ludlow 260
Buckland *v.* Pocknell 355
Buckle *v.* Mitchell 251
Buckley *v.* Corse 405
v. Daly 152
Buck Mountain Co. *v.* Lehigh Coal Co. 443, 465
Buckner *v.* Calcote 203
v. Chicago, M. & A. Ry. Co. 37
Budd *v.* Busti 353
Budges *v.* Linder 154
Buel *v.* Miller 258, 385
Buffalo, etc., R. R. Co. *v.* Lampson 80
Buford *v.* McKee 67, 69, 372
Bull *v.* Bull 72, 73, 534
v. Corry 563
v. Vardy 77
Buller *v.* Plunkett 168
Bullock *v.* Boyd 485, 486
v. Griffin 501
Bullows *v.* Committee 407
Bulow *v.* Witte 549
Bumpus *v.* Platner 265
Bunbury *v.* Bunbury 424
Bunce *v.* Gallagher 474
Bundy *v.* Sabin 190
Bunn *v.* Winthrop 66, 67
Bunnell's Appeal 439, 443
Burbank *v.* Whitney 136
Burch *v.* Breckenridge 102
Burd Orphan Asylum *v.* School District 121
Burgess *v.* Burgess 457
v. Moxon 357
v. Wheate 52, 60, 143
Burgesses of East Retford *v.* Thos. De Hercy 3, 402
Burgin *v.* Giberson 196
Burk's Appeal 377
Burk *v.* Adams 293
Burke *v.* Cassin 458
v. Murphy 37
Burkholder's Appeal 189
Burkmaster *v.* Thompson 377
Burn *v.* Carvalho 167, 168
Burnet *v.* Cincinnati 424
Burnham *v.* Bowen 344
v. Kempton 37
Burnley *v.* Thomas 100, 103
Burns *v.* The Huntingdon Bank 330
Burnside *v.* Terry 151
Burr *v.* Sim 307, 318
v. Smith 122, 130
Burrell *v.* Nicholson 562
v. Root 366
Burrow *v.* Ragland 199
Burrowes *v.* Lock 214
Burrows *v.* McWhann 329, 336
Burrus *v.* Roulhac 353
Burt *v.* Hellyar 489
v. Herron 72, 74
v. Wilson 353
Burtch *v.* Elliott 248
Burton's Appeal 288
Burton *v.* Black 419
Burwell *v.* Fauber 337
Buse *v.* Page 154
Bush *v.* Allen 99
v. Golden 273
v. Lathrop 171
v. Marshall 353
Bush's Appeal 55, 106
Bushnell *v.* Bushnell 581
v. Harford 474
Bushong *v.* Taylor 336
Butch *v.* Lash 411
Butcher *v.* Kemp 298
v. Yocum 268
Bute *v.* Glamorganshire Canal Co. 503
Butler In re 203
Butler *v.* Birkey 337
v. Burleson 463
v. Butler 113
v. Duncan 220
v. Freeman 578
v. Haskell 203, 219, 220
v. Hicks 92
v. Ins. Co. 84
v. O'Hear 378
v. Rogers 440
v. Rutledge 80
v. Stevens 268
v. The Railroad 166
Butman *v.* Hussey 191

Butt *v.* Ellet 165
v. Ex parte 167
Butterfield *v.* Klaber 441
Buttricke *v.* Brodhurst 304
Buxton *v.* Lister 368
Buzard *v.* Houston 13, 200
Byard *v.* Holmes 206, 1207
Byers *v.* Danley 83
v. Surget 219
Byrchall *v.* Bradford 142
Byrne *v.* Byrne 538

C.

Cabada *v.* De Jongh 167
Cabeen *v.* Breckenridge 268
Cabot *v.* Christie 214
Cadbury *v.* Duval 534
Cadigan *v.* Brown 37, 415
Cadman *v.* Horner 42
Cadogan *v.* Kennett 241
Cadwalader's Appeal 94, 376
Cady *v.* Potter 419
Cain *v.* Hunt 258
Cairo, &c., R. R. Co. *v.* Titus 409
Calder *v.* Chapman 280
Caldwell, Ex parte 168
v. Hartrupee 166, 167
v. Knott 440
v. Williams 66, 69, 373
Calhoun *v.* Richardson 258
California *v.* McGlynn 199
Callis *v.* Waddy 203
Calloway *v.* Witherspoon 230
Camblos *v.* Philadelphia and Reading R. R. Co. 400
Cambridge *v.* Littlefield 284
Camden *v.* Vail 355
Camp *v.* Bostwick 330
Campan *v.* Vandyke 202
Campbell's Appeal 255
Estate 69
Campbell *v.* Brackenridge 264
v. Brown 65
v. Campbell 43
v. Day 169
v. Dearborn 155
v. Foster 61
v. Freeman 385
v. Johnson 143
v. Leach 194
v. McLain 93, 239
v. Mesier 328
v. Mullett 515
v. Murphy 501
v. Seaman 441, 442
v. Walker 94
Canal Company *v.* Clark 457
v. Sansom 180
Canedy *v.* Marcy 196
Canfield *v.* Bostwick 347
Canning *v.* Canning 491
Cannon *v.* Barry 432
v. Collins 385
v. McNab 37
Canterbury Aqueduct Co. *v.* Ensworth 376
Canton Co. *v.* The Railroad Co. 377
Cape Breton Co., In re 239
Capers *v.* McCaa 82
Caplinger *v.* Stokes 86
Caplin's Will, In re 77
Carew *v.* Rutherford 28
Carey *v.* Askew 297
v. Cary 74, 232
Carhart's Appeal 66
v. Juniper 264
Carling's Case 239
Carlisle *v.* Cooper 439, 440
v. Jumper 264
v. Stevenson 400
Carlon, Ex parte 167
Carlton *v.* Salem 37
Carpenter *v.* Bowen 152
v. Carpenter 293
v. Cushman 65
v. Danforth 237
v. Jones 187
v. Mitchell 103
v. Mut. S. Ins. Co. 368, 370
v. Snelling 154
Carr *v.* Carr 155
v. Easterbrooke 110
v. Rising 154
v. Wallace 284
Carrico *v.* The Farmers' Bank 353
Carrington *v.* Didier 529
Carroll *v.* Ballance 151
v. Johnston 264
v. Lee 100
v. Van Rensselaer 353
Carron Iron Company *v.* Maclaren 424
Carry *v.* Carry 74
Carson *v.* Carson 72
v. Murray 115
Carter *v.* Balfour 130
v. Boehm 213
v. Carter 115, 492
v. City of Chicago 465
v. Jones 337
v. Taylor 489
v. Thompson 94, 239
Cartwright *v.* Green 559
v. Wise 84
Caruthers *v.* Humphrey 151
Carver *v.* Peck 527
Casborne *v.* Scarfe 151
Case of Jesus College 121

Case *v.* Abeel 514
v. Case 219
v. Codding 81
v. Fishback 175
v. Garrish 249
v. McCabe 359
v. Peters 196
Casler *v.* Thompson 385
Caspari *v.* First German Church 231
Cass Co. *v.* Oldham 189
Cassedy *v.* Jackson 162
Castle *v.* Wilkinson 390
Castleman *v.* Veitch 487, 489
Caston *v.* Caston 304
Caswell *v.* Davis 457
Cater *v.* Eveleigh 103
Cathcart *v.* Robinson 251, 364, 395
Catlin *v.* Henton 151
Caton *v.* Caton 211, 385
Cavander *v.* Bulteel 268
Cave *v.* Cave 264, 268
Cecil *v.* Juxon 113
v. Spurger 213
Cecil Bank *v.* Snively 80
Central R. R. Co. of Venezuela, Directors of, *v.* Kisch 208
Chadwick *v.* Turner 272, 273
Chaffee *v.* Quidneck Co. 465
Chaffees *v.* Risk 49
Chalfant *v.* Williams 190
Chamberlain *v.* Blue 370
v. McClurg 202
v. Thompson 151, 158
Chamberlaine *v.* Chamberlaine 199
Chamberlayne *v.* Temple 333
Chambers *v.* Ala. Iron Co. 365
v. Cannon 478
v. Crabbe 253
v. Goldwin 153
v. St. Louis 130
v. Tulane 378
Chambersburg Sav. Fund's App. 137
Champion *v.* Brown 365
Champlin *v.* Champlin 115
v. Laytin 187, 188
Chance *v.* Beall 370
Chancey's Case 538
Chandelor *v.* Lopus 198, 207
Chandler *v.* Moulton 143
v. Von Roeder 243
Chapin *v.* Dake 223
v. Pease 248
v. Universalist Society 55
Chapman, In re 424
Chapman *v.* Bankers' & Tradesmans' Pub. Co. 37
v. Beardsley 353
v. Chapman 284, 357
v. Wilbur 65
Chappedelaine *v.* Dechenaux 486
Chapple *v.* Mahon 153
Charles *v.* Coker 100
Charlesworth *v.* Holt 115
Charter *v.* Trevelyan 203
Chartier *v.* Marshall 380
Chase's Case 498
Chase *v.* Allen 179
v. Barrett 175
v. Chase 72, 77
v. Curtis 527
v. Lockerman 346
v. Palmer 110
v. Peck 357
v. Petroleum Bank 167
v. Woodbury 333
Chastain *v.* Smith 80, 86
Chaudron *v.* Magee 274
Cheeseborough *v.* Millard 333, 338, 340, 356
Cheever *v.* Wilson 102
Chertsey Market, In re 425
Cherbonnier *v.* Ebits 231
Cheshire *v.* Payne 253, 255
Chesson *v.* Chesson 486
Chesterfield *v.* Janssen 24, 205, 220, 229
Chesterman *v.* Gardner 268
Cheswell *v.* Chapman 492
Cherry *v.* Stein 441
Cheever *v.* Wilson 102
Chew *v.* Barnet 264
v. Nicklin 310
Chewning *v.* Singleton 177
Chicago, &c., Rd. *v.* N. Y., L. E. & W. Rd. 462
Chicago R. R. Co. *v.* Nichols 166, 172
Chichester *v.* Bickerstaff 325
Child *v.* Douglass 400
v. Mann 420
Children's Hospital, (Appeal of) 131
Chilton *v.* Braidon 353
Chipman *v.* Morrill 329
Chippendale, Ex parte 357
Chiswell *v.* Morris 499, 500
Cholmondeley *v.* Clinton 152, 260
Chorpenning's Appeal 94, 143
Chouls *v.* Chouls 544
Christ *v.* Diffenbach 258
Christ's Hospital *v.* Grainger 133
Christler *v.* Meddis 312
Christmas *v.* Griswold 167
v. Russell 166
Christy *v.* Barnhart 385
Chuk *v.* Willets 151
Chupp *v.* Upton 239
Church *v.* Church 130, 265
v. Cole 154
v. Disbrow 72
(M. E.) *v.* Jaques 257
v. Ruland 2, 9, 37, 91, 95 199, 218, 265

Church *v.* Sterling 86
Churcher *v.* Guernsey 268
Churchill *v.* Churchill 300
Citizens' Bank *v.* First Nat. Bank 211
City Bank *v.* Bangs 422
v. Luckie 351
City Council *v.* Page 268, 274
City of Atlanta *v.* Gate City Gas Co. 424
City of Columbus *v.* Jaques 433
City of Georgetown *v.* Alexandria Canal Co. 439
City of Hartford *v.* Chipman 37
City of Philadelphia *v.* Davis 297, 299 303
City of St. Louis *v.* Knapp 439
Clagett *v.* Kilbourne 511
v. Salmon 410
Clapp *v.* Rice 330
v. Leatherbee 251
Clarendon (Earl of) *v.* Hornby 491
Clark's Appeal 37, 436, 469
Clark *v.* Cantwell 92
v. Clark 80, 81, 115, 146, 188, 458
v. Condit 153
v. Douglass 241
v. Dutcher 189
v. Everhart 215
v. Freeman 456
v. Garfield 141
v. Henry 153
v. Henry's Adm'r 37
v. Lyon 154
v. Martin 404
v. Mauran 167
v. McGuire 100
v. Miller 102
v. Partridge 258
v. Robinson 37, 200
v. Sewell 538
v. Sisson 285
Clarke et al, (Appeal of) 484
Clarke *v.* Clayton 490
v. Devaux 237
v. Dickson 207, 208
v. Drake 181
v. Franklin 315, 319, 320
v. Henshaw 346
v. Lott 66
v. Price 464
v. Robinson 37
v. Royle 355
v. White 217
Clarkson *v.* Morgan 274
Claussen *v.* La Franz 86
Clavering *v.* Clavering 67
Clay *v.* Hart 295, 304
Claydon *v.* Green 393
Clayton *v.* Carey 37
Clayton *v.* Illingworth 364
Clegg *v.* Rowland 432
Cleland *v.* Fish 234
Clement *v.* Hyde 120
Clements *v.* Moore 241, 243
v. Welles 463
Clementson *v.* Gandy 303
Clemson *v.* Davidson 167
Clery's Appeal 347
Cleveland *v.* Burrill 366
v. Citizens' Gas Light Co. 439, 442
Clevenstine's Appeal 100
Click *v.* Click 86
Clifton *v.* Cockburn 189
v. Davis 230
Climer *v.* Hovey 382
Clinan *v.* Cooke 285, 470
Clinton *v.* Meyers 42
Clinton, Port R. R. Co. *v.* Cleveland and Toledo R. R. Co. 377
School District's Appeal 424
(Town of) *v.* Town of Westbrook 151
Clive *v.* Carew 102, 147
Clodfelter *v.* Cox 169
Cloudas's Executor *v.* Adams 534
Clowes *v.* Dickenson 333, 341
Clyde *v.* Simpson 277
Coates *v.* Gerlach 114, 247
Cobb *v.* The Illinois R. R. Co. 465
Cobbethorn *v.* Williams 8
Coble *v.* Nonemaker 263
Cochran *v.* O'Hern 60
Cochrane *v.* O'Brien 421
Cock *v.* Van Etten 203
Cockell *v.* Bacon 426
Cocks *v.* Chandler 456
v. Izard 210
Codd *v.* Codd 582
Coddington *v.* Pensacola & Georgia Rd. 260
Coder *v.* Huling 86
Codrington *v.* Lindsay 295
Coe *v.* The Winnepiseogee Co. 440
Coffee *v.* Ruffin 219
Coffman *v.* Lookout Bank 230
Cogan *v.* Duffield 58
v. Stephens 316
Coggeshall *v.* Pelton 123, 124
Coggs *v.* Bernard 359
Cohn *v.* Chapman 80
Coker *v.* Simpson 436
Colburn *v.* Simms 447
Colby *v.* Kenniston 273
Colclough *v.* Boyse 574
Cole *v.* Colly 37
v. Gibson 224

Cole *v.* Littlefield 72
v. O'Neill 254
v. Potts 385
v. Van Riper 103
v. Wade 77
Cole Silver Mining Co. *v.* Virginia Co. 400
Coleman's Appeal 389, 478
Coleman *v.* Columbia Oil Co. 204
v. Wooley 103
Coles *v.* Trecothick 237
Colgate *v.* Colgate 239
Collier *v.* McBean 387
v. Pfenning 284
Collingwood *v.* Row 313, 321
Collins's Appeal 165
Collins *v.* Archer 264, 501
v. Carlisle 72, 77
v. Case 239
v. Champ's Heirs 307
v. Collins 115, 355
v. Dickenson 489
Collins Co. *v.* Brown 456
Collinson *v.* Patrick 67
Collis *v.* Robins 347
Collyer *v.* Fallon 166
Colman *v.* Eastern Counties Railway Co. 465
v. Sarrel 66, 581
Colson *v.* Thompson 377
Colt *v.* Ives 168
Colton *v.* Ross 199
Columbia, Bank of, *v.* Hagner 391
Columbine *v.* Chichester 368
Columbus (City of) *v.* Jaques 443
Colvin's (Rachel) Case 578
Colwell *v.* Woods 154
Colyer *v.* Clay 376
v. Finch 171, 264
Coming, Ex parte 357
Commerce (Appeal of Bank of) 159
Commercial Bank *v.* Western Reserve Bank 333
Commissioners *v.* Long 439
v. Walker 136
Commonwealth *v.* Addicks 546
v. Bank 465
v. Bank of Penna. 465
v. Martin 315
v. McAllister 86
v. Moltz 280, 282, 283
v. Pittsburgh and Connellsville R. R. Co. 435
v. Rush 439
v. Stauffer 227
v. The Supervisors 424
v. Watmough 168
Compton *v.* Greer 486
Comstock *v.* Johnson 43
v. Smith 281
Conaway *v.* Sweeney 364
Concord Bank *v.* Bellis 293
v. Gregg 218
Connelly *v.* Harrison 167
Congregation *v.* Williams 280, 283
Congress and Empire Spring Co. *v.* High Rock Spring Co. 456
Conklin *v.* Conklin 492
Conley *v.* Ala. Gold Life Ins. Co. 419
Conner *v.* Chase 470
Connolly *v.* Branstler 293
Conover *v.* The Mayor 409
Conrad *v.* Foy 339
v. Harrison 333
Conroy *v.* Woods 527
Consequa *v.* Fanning 486
Corbin *v.* Cantrell 103
Const *v.* Harris 510
Constable *v.* Bull 72, 76
Constant *v.* Matteson 144
Continental Nat. Bank *v.* Nat. Bank of the Commonwealth 290
Converse *v.* Blumrich 214
v. McKee 515
Conway *v.* Cutting 167
Conway's Ex'rs *v.* Alexander 154
Conwell *v.* Evill 470
Conyngham's Appeal 359
Cooch *v.* Gerry 151
Cook, Ex parte 515
v. Barr 64
v. Brightly 169
v. Cole 474
v. Collier's Adm'rs 248
v. Cook 210, 218, 258, 310
v. Finkler 151
v. Gregson 152, 534
v. Husband 103
v. Johnson 242
v. Kennerley 100
v. Mancius 274
v. Roselyn 420
Cook & Gleason, In re 517
Cooke *v.* Chilcott 400, 463
v. Dealey 316
v. Lamotte 67, 231
v. Nathan 212
Cookes *v.* Culbertson 157
Cookson *v.* Cookson 311, 324
v. Reay 312
v. Toole 103
Cooley *v.* Brayton 274
Coombe *v.* Meade 37
Coon *v.* Atwell 207
v. Swan 563
Cooney *v.* Woodburn 107
Coope *v.* Twynam 330

Cooper *v.* Cooper 256, 302
v. Davis 433
v. Farmers' Ins. Co. 191, 469
v. Hood 507
v. Lovering 207
v. MacDonald 60, 101
v. Phibbs 92, 187, 188
v. Reilly 166
Coopwood *v.* Bolton 485
Cooth *v.* Jackson 387
Coover's Appeal 522
Cope *v.* Smith 339
Copis *v.* Middleton 335, 336
Coppage *v.* Barnett 81
v. Threadgill 110, 113
Corbett *v.* Poelnitz 103
Corbin *v.* Cantrell 103
Corbitt *v.* Corbitt 489
Corby *v.* Bean 43
Cordingly *v.* Cheesebrough 389
Cornell *v.* Hall 154
v. Lovett 227
Corn Exchange Bank *v.* Babcock 103
Cornfoot *v.* Fowke 218
Cornick *v.* Pearce 312
Corning *v.* Lowerre 439, 443
v. Troy Iron Co. 284, 400
Cornish *v.* Abington 290
v. Bryan 474
v. Clark 243
v. Wilson 534
Cornwall *v.* Cornwall 512
Corporation of Gloucester *v.* Wood 87
of Reading *v.* Lane 120
Corps *v.* Washington 563
Corson *v.* Craig 170
v. Mulvany 37, 376
Cory *v.* Cory 230
Cory Universalist Soc. *v*, Beatty 122
Coryton *v.* Heylar 53
Cotesworth *v.* Stephens 351
Cotheal *v.* Talmage 179
Cotrell's Appeal 336
Cotterell *v.* Long 154
Cotton *v.* Woods 84
Cottrell *v.* Adams 153
Couch *v.* Sutton 329
v. Terry 329
Coughlin *v.* Seags 55
Counterman *v.* Dublin 284
Countess of Mornington *v.* Keene 165
County of Morgan *v.* Allen 527
Schuylkill *v.* Copley 202
Courtwright *v.* Barnes 237
v. Burns 37
Coutts *v.* Ackworth 300
Coventry *v.* Coventry 347
Cowan's Appeal 234
Cowan *v.* Jones 37
Cowden's Estate 333
Cowdry *v.* Day 153
Cowee *v.* Cornell 234
Cowell *v.* Edwards 329
Cowles *v.* Gale 393
v. Raguet 223
v. Whitman 368
Cowley *v.* Hartsonge 312
v. Wellesley 432
Cowls *v.* Cowls 542
Cowman *v.* Harrison 76
Cowper *v.* Baker 436
v. Clerk 417
Cox *v.* Corkendall 349
v. Fenwick 356
v. Hickman 506
v. McMullin 492
v. Middleton 371
v. Milner 268
v. Rogers 304
v. Sprigg 66
Cozine *v.* Graham 64
Crabb *v.* Crabb 65
Crabtree *v.* Bramble 324
Craft *v.* Dickens 190
v. Lathrop 418
Craig *v.* Ankeney 328
v. Leslie 307, 314, 318
v. Watt 100
Crain *v.* Barnes 37
Crampton *v.* Zabriskie 424
Crandall *v.* Lincoln 527
Crane *v.* Bunnell 409
v. Burnhager 420
v. Conklin 230
v. DeCamp 376
v. Deming 159
Cranmer, Ex parte 551
Cranston *v.* Plumb 570
Craven *v.* Winter 67
Crawford's Appeal 66
Crawford *v.* Ross 577
v. Taylor 151
v. Wick 228
Crawley *v.* Timberlake 353, 356, 432
Crawshay *v.* Maule 507, 508
v. Thompson 217
v. Thorton 419, 420, 421
Craythorne *v.* Swinburne 329
Creath *v.* Sims 42
Creed *v.* Lancaster Bank 80, 83
v. Scruggs 43
Creigh *v.* Boggs 382
Cressman's Appeal 67
Cresson's Appeal 123, 136
Cresson *v.* Miller 268
Creuze *v.* Hunter 546
Creveling's Ex'rs *v.* Jones 539
Crewe *v.* Dicken 137
Cribbins *v.* Markwood 219, 220
Crim *v.* Handley 409
Crockett *v.* Crockett 65
v. Maguire 271

Croft *v.* Adam 77
v. Day 456
v. Graham 221
Crompton *v.* Vesser 66
Cronk *v.* Trumble 376
Crooker *v.* Crooker 515
Crosby *v.* Huston 271
Croskey *v.* European and American Steam Shipping Co. 481
Cross *v.* De Valle 571
Crossley *v.* Elworthy 243
v. Lightowler 439
Crossling *v.* Crossling 77
Crossman *v.* Penrose Ferry Bridge Co. 217
Crow *v.* Robinson 168
Crowder *v.* Tinkler 441
Croxall *v.* Sharrard 53, 55, 60
Croyle *v.* Moses 206
Cruess *v.* Fessler 207
Crump *v.* Lambert 439, 441
v. Redd's Administrator 72
Cruse *v.* Barley 317
v. Paine 331
Cruttwell *v.* Lye 228
Cruwys *v.* Coleman 65, 72, 73, 75, 76
Cubberly *v.* Cubberly 468
Cuddee *v.* Rutter 368, 370, 375
Culbertson's Appeal 55
Cullyer *v.* Kynvett 8
Cumberland *v.* Codrington 332, 348
Cumberland Co. *v.* Sherman 188
Cumming *v.* Williamson 103
Cumming's Appeal 219
Cummings *v.* Arnold 385
v. Coe 467
Cummins *v.* Balgin 470
Cunliffe *v.* Cunliffe 73
Cupit *v.* Jackson 577
Curd *v.* Wunder 410
Cureton *v.* Gilmore 392
Curling *v.* May 310
Curran *v.* Trust Co. 133
Currie's Case 239
Currie *v.* Goold 189
Curry *v.* Keyser 207
v. Pile 539
Curtenius *v.* Hoyt 465
Curtir *v.* Engel 103
Curtis *v.* Auber 165
v. Blair 37
v. Curtis 498
v. Lunn 265
v. Mundy 268
Cushing *v.* Danforth 93
Custar *v.* Titusville Gas and Water Co. 217
Cuthbert *v.* Wolfe 100
Cutler *v.* Smith 258
Cutler *v.* Tuttle 82
Cutting *v.* Dana 377
v. Gilbert 417
Cutts *v.* Perkins 164, 167
Cuyler *v.* Ferrill 489

D.

Dabney *v.* Green 151
Daily *v.* Litchfield 370
Dakin *v.* Union Pacific R. R. Co. 478
Dale, Ex parte 86
Dale *v.* Cooke 327
v. Hamilton 64
Dallas *v.* Heard 103
Dalton, &c., R. R. Co. *v.* McDonald 465
Dalzell *v.* Crawford 364, 378
Dana *v.* Newhall 265
Daniel *v.* Adams 376
v. Mitchell 216
Daniell *v.* Leitch 500
Daniels *v.* Davison 268, 365
Dankel *v.* Hunter 377
Danyell *v.* Belyngburgh 8
Danzeisen's Appeal 154
Darby *v.* Darby 511
D'Arcy *v.* Blake 60, 501
Dargan *v.* Waring 526
Darnall *v.* Hill 498
Darnell *v.* Rowland 230
Darnley *v.* London, Chatham and Dover R. R. Co. 381
Darlington's Appeal 237
D'Arras *v.* Keyser 313
Dashiell *v.* Att.-Gen. 130
Daughaday *v.* Paine 353, 355
Daury *v.* The Inhabitants of Natick 121
Davidson's Appeal 293
Davidson *v.* Barclay 285
v. Kemper 61
v. Little 219
v. Young 293
Davies *v.* Ashford 322
v. Jenkins 97
v. Stainbank 409
Davis's Appeal 315
Davis *v.* Barr 170
v. Bigler 250
v. Cain 100
v. Christian 154
v. Clay 154
v. Davis 175
v. Funk 359
v. Harman 146
v. Headley 366
v. Henry 196
v. Hoopes 407
v. Hopkins 268

Davis *v.* Howell 516, 517
v. Jackson 207
v. Kendall 456
v. Lane 509
v. Michener 425
v. Newton 110
v. Page 304
v. Parker 366
v. Petway 209
v. Reed 436
v. Sawyer 441
v. The Bank of England 263
v. Tollemache 367
v. Uphill 256
v. Wetherill 151
Davoue *v.* Fanning 92, 94
Daw *v.* Terrel 357
Dawes *v.* Scott 347
Dawson *v.* Dawson 65, 66, 67
v. Massey 234
v. Newsome 370
v. Williams 504
Day, Ex parte 516
Day *v.* Cohn 261
v. Hale 353, 356
v. Luhke 393
v. Roth 64, 65, 86
Dayton *v.* Fargo 166
Dean *v.* Charlton 43
v. Dean 63, 64
v. Fuller 230
v. O'Meara 492
v. Smith 581
Dearborn *v.* Taylor 335
Dearin *v.* Fitzpatrick 110
Dearle *v.* Hall 168
Deatley *v.* Murphy 230, 248
De Barante *v.* Gott 114
De Beauvoir *v.* De Beauvoir 310, 317
Deborough *v.* Harris 421
Decamp *v.* Dobbins 119
De Carriere *v.* De Calonne 581
Dech's Appeal 364
Decker *v.* Eisenhauer 170
v. Howell 524
Dederer *v.* Voorhis 575
Dedman *v.* Chiles 418
Deering *v.* Boyle 103
Deford *v.* Mercer 190
Dehon *v.* Foster 407, 424
De Houghton *v.* Money 166
Deibert's Appeal 55
De Jarnette *v.* De Jarnette 139
De Laine Co. (Atlantic) *v.* Tredick 407
Delamater's Estate 66
Delamere's Case 52
De Lancy *v.* Reg. 314
De Laurencel *v.* De Boom 64
Del. and Md. Rd. Co. *v.* Stump 443
Delaware and Raritan Co. *v.* Raritan and Delaware Bay R. R. Co. 465
De Lisle *v.* Priestman 358
Dellinger's Appeal 65, 66
Delmas *v.* Insurance Company 374
De Manneville *v.* Crompton 253
v. De Manneville 546
Demarest *v.* Hardham 441
De Marest *v.* Wyncoop 151, 265, 471
Dempsey *v.* Bush 338
Den *v.* Bordine 55
v. Brown 160
Denechaud *v.* Berry 103
Dennis *v.* Dennis 382
v. Eckhardt 441
v. Williams 353
Dennison *v.* Goehring 57, 67, 69, 84, 194
Denniston *v.* Hoagland 385
Densmore *v.* Densmore 239
Dent *v.* Turpin 456
Denton *v.* Denton 52, 55, 581
v. Jackson 417
v. Leddell 440
v. MacNeil 260
v. Nanny 151
v. Stewart 390, 477, 478
De Peyster *v.* Gould 80, 83
Derby *v.* Derby 130
Derby Turnpike Co. *v.* Parks 198
De Reimer *v.* Cantillon 190
Dering *v.* Earl of Winchelsea 328, 329, 330, 331, 335, 336, 337
De Ruvigne's Case 239
De Scarlett *v.* Dennett 181
Desilver's Estate 230
De Veney *v.* Gallagher 435, 503
Devenish *v.* Baines 199
Devey *v.* Thornton 578
De War *v.* Waitland 297
Dewhurst, Ex parte 351, 515
Dewitt *v.* Ackerman 489
v. Yates 539
Dewy *v.* Field 280
Dexter *v.* Arnold 486
Dey *v.* Dunham 273
v. Martin 409
v. Williams 538
D'Eyncourt *v.* Gregory 493
Dezell *v.* Odell 282
Dial's Executors *v.* Rogers 485
Diamond Coal Co. *v.* Fisher 288
Diamond *v.* Lawrence County 274
Diamond Match Co. *v.* Rober 463
Dick *v.* Doughton 501
v. Pitchford 61
Dickenson *v.* Grand Junction Canal Co. 461
Dickenson's Appeal 66
Dickerson *v.* Stoll 503

Dickerson *v.* The Commissioners 409
Dickey *v.* Thompson 333
Dickinson *v.* Codwise 86, 93
v. Dickinson 304, 514
Dickson *v.* Montgomery 117, 130
Diggs *v.* Wolcott 424
Digs *v.* Boys 274
Dike *v.* Green 377
Dill *v.* Shahan 187
v. Wisner 148
Diller *v.* Brubaker 237, 359
Dillett *v.* Kemble 191
Dillinger's Appeal 115
Dillon *v.* Coppin 69
Dilworth's Appeal 441
Dilworth *v.* Mayfield 512
Diman *v.* Providence R. R. Co. 191, 258, 259
Dimmock *v.* Hallett 209
Dinwiddie *v.* Bailey 484
Diploch *v.* Hammond 167
Directors of Central R. R. Co. of Venezuela *v.* Kisch 208
Disbrow *v.* Jones 268
Distilled Spirits, The 268
Dixon *v.* Hodan 453
v. Holden 465
v. Muckleston 357
v. Saville 60
Dixon Crucible Co. *v.* Guggenheim 456
Doane *v.* Russell 358
Dobyns *v.* McGovern 37
Dodd *v.* Flavell 405
v. Hartford 424
v. Levy 527
v. Seymour 377
Dodge *v.* Griswold 526
v. Knowles 102
v. Pope 283
v. Strong 409
v. Woolsey 465
Dodson *v.* Ball 55, 98
Doe *v.* Cafe 65
v. Doe 575
v. Dowdall 280
v. Finch 53
v. James 251, 261
v. Lewis 253
v. Passingham 53, 63
Doebler's Appeal 380
Doggett *v.* Hart 503
Doherty *v.* Allman 432
Dohnert's Appeal 421
Dolan *v.* McDermot 131
Dollar Savings Bank *v.* Bennett 80
Doloret *v.* Rothschild 368
Dolphin *v.* Aylward 248
Domestic Tel. & Teleph. Co. *v.* Metropolitan Co. 370
Dominick *v.* Michael 310
Domweil *v.* Ward 527
Donahue *v.* Conrahy 65
Donald *v.* Suckling 359
Donaldson *v.* Beckett 450
v. Donaldson 66, 67, 168
v. Gillot 202
v. Williams 177
Doner *v.* Stauffer 515, 522
Donnell *v.* Mateer 487, 489
Donnington *v.* Mitchell 107
Donohugh *v.* The Library Co. 121
Donohugh's Appeal 121
Donovan *v.* Donovan 205
Dooley *v.* Watson 180
Dormer *v.* Fortescue 499
Dorr *v.* Shaw 342
Dorrow *v.* Kelley 158
Dorset (Duke of) *v.* Girdler 573
Dorsey *v.* Clarke 80
v. Garey 52, 135
Dorsheimer *v.* Rorback 529
Doty *v.* Judson 190
v. Martin 463
v. Mitchell 103
Dougan *v.* Blocher 385
Doughady *v.* Crowell 492
Dougherty *v.* Colgan 153
v. Jack 251
Doughty *v.* Doughty 409
v. Savage 249
Douglas *v.* Douglas 304
Douglass *v.* Brice 84
v. Fagg 330
v. Grant 469
v. Martin 37
v. Russell 164
v. Wiggins 432
Dowell *v.* Dew 194
v. Mitchell 37
Dowling *v.* Betjemann 370
Downe *v.* Morris 151
Downer *v.* The Bank 264
Downes *v.* Jennings 254
Downham *v.* Blethyn 8
Downs *v.* Collins 507
Dows *v.* Chicago 424
v. Durfee 485
Doyle *v.* Doyle 113
v. Sleeper 84
Dragoo *v.* Dragoo 376
Drake *v.* Glover 293
v. Latham 212
v. Root 151
Dransfield *v.* Dransfield 581
Drant *v.* Vause 321
Dresbach *v.* Minnis 281
Dressel *v.* Jordan 392
Dresser *v.* Dresser 72, 73

Dresser *v.* Norwood 268
Drew *v.* Hayne 37
v. Lockett 335
v. Wakefield 88
Droan *v.* Smith 432
Drummond *v.* Pigon 426
Drury *v.* Foster 293
v. Molins 464
Dryden *v.* Hanway 83
Dubois *v.* Baum 392
v. Hull 353
Dubourg de St. Colombe's Heirs *v.* United States 482
Dubs *v.* Dubs 60
Duchess of Kingston's Case 281, 294
Ducommun's Appeal 146
Dudley *v.* Bachelder 81
v. Bosworth 84
v. Mayhew 451
Duff *v.* Wilson 93
Du Hourmelin *v.* Sheldon 60, 314
Duke *v.* Hague 489
Duke of Beaufort *v.* Glyn 412
v. Neeld 191
Duke of Bolton *v.* Williams 422
Duke of Leeds *v.* Corporation of New Radnor 504
v. Powell 504
Duke of Marlborough *v.* Godolphin 77
Duke of Norfolk's Case 133
Duke of Somerset *v.* Cookson 368
Dull's Appeal 474, 575
Dummer *v.* Corp. of Chippenham 562
v. Pitcher 303
Dumond *v.* Magee 113
Dumont *v.* Dufore 376
Dumpor's Case 61
Duncan's Appeal 253
Duncan *v.* Duncan 304
v. Hayes 440
v. Lyon 327, 409
Duncomb *v.* Richards 230
Duncult *v.* Albrecht 368
Dundas's Appeal 94
Dunklee *v.* Adams 181
Dunkley *v.* Dunkley 110
Dunklin *v.* Wilkins 166
Dunlap *v.* Clements 341
v. Dunlap 346
v. Wilson 151
Dunn and Biddle's Appeal 55
Dunn *v.* Chambers 219, 235
v. Stevens 385
Dunphy *v.* Kleinsmith 526
Dunsmore *v.* Newsheimer 407
Dunston *v.* Paterson 292
Dupuy *v.* Johnson 333
Duquesne Bank's Appeal 222
Durant *v.* Williamson 440
Durell *v.* Pritchard 400, 404
Durfee *v.* Old Colony R. R. Co. 465
v. Pavitt 82, 85
Durham *v.* Wadlington 189
Durling *v.* Hammar 86
Durr *v.* Bowyer 110, 113
Dursley *v.* Fitshardinge 573
Dutton *v.* Dutton 115
v. Warschauer 151
Duval *v.* McCoskey 151
Duvall *v.* The Farmers' Bank 113
D'Wolf *v.* Pratt 389
Dyer *v.* Clark 512
v. Dyer 80, 83, 84
v. Shurtliff 94
Dyett *v.* North Am. Coal Co. 103
Dykes's Estate, In re 193, 194
Dyott's Appeal 142

E.

Eachus *v.* Moss 400
Eaglesfield *v.* The Marquis of Londonderry 187
Earl *v.* Halsey 143
Earl of Mexborough *v.* Bower 400
Earl of Bath *v.* Sherwin 418
Earl of Clarendon *v.* Hornby 491
Earl of Egmont *v.* Smith 364
Earl of Jersey *v.* Briton Ferry Floating Dock Co. 355
Earl of Kildor *v.* Eustace 47, 52
Earl of Oxford's Case 10, 407, 411
Earl Spencer *v.* Peek 573
Earlom *v.* Saunders 311, 314
Early *v.* Friend 492
Earnest's Appeal 84
Earp's Appeal 55
East & West Rd. Co. *v.* E. Tenn., Va. & Ga. Rd. Co. 465
East India Co. *v.* Atkyns 153
v. Boddam 174, 177
East Lewisburg L. & M. Co. *v.* Marsh 167
East Retford (Burgesses of) *v.* Thomas De Hercy 8, 402
Easterly *v.* Keney 61
Eastman *v.* Amoskeag Co. 440
v. Plumer 219, 392
Eaton *v.* Watts 72, 74
v. Whitaker 385
Ebert's Appeal 513
Eberts *v.* Eberts 234
Ebrand *v.* Dancer 84
Echelkamp *v.* Schrader 435, 436
Eckman *v.* Eckman 475, 575
Eddoes, In re 77
Edelsten *v.* Edelsten 456

Edgar *v.* Donnelly 86
Edge *v.* Worthington 357
Edgington *v.* Fitzmaurice 208
Edmonson *v.* Dyson 57
Edmunds' Appeal 93, 475
Edmunds *v* Crenshaw 146, 274
Edridge *v.* Hill 417
Edward's Executors *v.* Trumbull 357
Edwards *v.* Appelbee 367
v. Banksmith 274
v. Burt 220
v. Edwards 81, 84
v. Graves 52
v. Jones 67, 100
v. Lowndes 52
v. Parkhurst 166
Edyall *v.* Hunston 8, 402
Egbert *v.* Brooks 144
Ege *v.* Koontz 189
v. Wedlar 60
Egerton *v.* Brownlow 57
Ehleringer *v.* Moriarty 190
Eib *v.* Martin 167
Elcock *v.* Mapp 88
Elder *v.* Elder 382
v. Jones 166
Eldridge *v.* Eldridge 499, 500
v. Hill 417
v. See Yup Company 65
v. Smith 93, 575
Elibank *v.* Montolieu 96, 110
Eliot *v.* Merchants' Ex. 526
Elliot *v.* Elliot 234
Elliotson *v.* Feetham 442
Elliott *v.* Armstrong 80, 83
v. Carter 346, 349
v. Fisher 314
v. Ins. Co. 284
v. Merryman 277
v. Pool 143
Elliott's Ex'rs' Appeal 168, 246
Ellis *v.* Davis 37
v. Ellis 72, 385
v. Lewis 298
v. Nimmo 69
v. Selby 131
v. Temple 353
Ellison *v.* Daniels 152
v. Ellison 66, 67, 243, 245, 250, 251
v. Moffatt 39, 486
Elmendorf *v.* Lansing 46, 425
Elrod *v.* Lancaster 143
Elwell *v.* Chamberlain 218
Elwes *v.* Mawe 432
Elwood *v.* Deifendorf 337
Elwyn's Appeal 166
Ely (Bishop of) *v.* Kenrick 503
Emerick *v.* Emerick 63
Emerson *v.* Atwater 155
v. Davies 452
v. Hall 166
v. Smith 42
Emery *v.* Lawrence 165
Emmanuel Col. *v.* Evans 150
Emmons *v.* Cairns 570
Emperor of Austria *v.* Day 456, 465
England *v.* Curling 507
v. Downs 253, 255
v. Reynolds 68
Enos *v.* Hunter 83
Ensign *v.* Colburn 433
Enterprise Transit Co.'s Appeal 37
Epley *v.* Witherow 284
Equitable Gas Light Co. *v.* Balt. Coal Tar Co. 377
Erb's Appeal 330, 338
Erhardt *v.* Boaro 460
Erickson *v.* Willard 72, 73
Erlanger *v.* New Sombrero 239
Erskine's Trusts 110
Erson *v.* Nicholas 293
Ervin's Appeal 402, 459
Erwin *v.* Parham 219, 374
Eshelman *v.* Lewis 86
Essex *v.* Essex 507
Espy *v.* Conier 512
Etna Ins. Co. *v.* Wires 337
Evangelical Association's Appeal 119
Evans *v.* Bagshaw 489
v. Ballte 66
v. Bicknell 198, 200
v. Bremridge 409
v. Coventry 577, 578
v. Duncan 341
v. Gillespie 100
v. Goodslet 353
v. Kimball 160
v. Kittrell 376
v. Knorr 100
v. Llewellyn 188
v. Missouri, etc., R. R. Co. 465
v. Peacock 220
Evans's Appeal 260, 315
(Mary) Estate 146
Evarts *v.* Steger 191
Everitt *v.* Everitt 231
Everman *v.* Robb 165
Everts *v.* Agnes 385
Evertson *v.* Booth 341
v. Central Bank 337
v. Tappan 92
Ewell *v.* Greenwood 439
v. Tidwell 199
Ewer *v.* Hobbs 151
Ewing's Appeal 376
Ewing *v.* Smith 103
Ewins *v.* Gordon 365, 377

Exchange Bank *v.* McLoon 166
v. Russell 258
Exel *v.* Wallace 57
Exeter *v.* Odiorne 55
Eyre *v.* Countess of Shaftesbury 542, 544, 545, 549, 550
v. McDowell 168
v. Potter 219
Eyrick *v.* Hetrick 61

F.

Fairbanks *v.* Lamson 122
Fairbrother *v.* Shaw 385
Fairies' Appeal 60, 107
Fairthorne *v.* Weston 508
Falcke *v.* Grey 368, 374
Fales *v.* Russell 177
Falk *v.* Turner 231
Fall *v.* Elkins 489
Fall River Whaling Co. *v.* Borden 513, 515
Fallon *v.* Railroad Co. 368, 377
Fame Ins. Co.'s Appeal 331
Fanning *v.* Dunham 43, 222
Fareira *v.* Gabell 223
Farebrother *v.* Welchman 409
Farewell *v.* Cotting 499, 500
Faribault *v.* Sater 207
Farina *v.* Silverlock 456
Faringer *v.* Ramsay 83
Faris *v.* Dunn 83
Farley *v.* Blood 419
v. St. Paul, M. & M. Ry. Co. 42
Farmer *v.* Farmer 234
v. Russell 42, 248
Farmers' Bank *v.* Groves 204
Farmers' & Dr. Bank *v.* Fordyce 190
Farmers' & Mech. Bk. *v.* King 86
Farmers' & Mech. Ins. Co. *v.* Simmons 167
Farmers' Rd. *v.* Reno Oil Creek Co. 400
Farnam *v.* Brooks 203
Farnham *v.* Campbell 575
v. Clements 80
Farnsworth *v.* Childs 272
v. Strasler 526
Farnum *v.* Burnett 159
v. Metcalf 151
Farr *v.* Farr 203
Farrant *v.* Lovell 433
Farrar *v.* Haselden 529
Farrell *v.* Cook 439
v. Lloyd 83
Farrington *v.* Knightly 52
Farris *v.* Wake 198
Fassett *v.* Traber 333
Fatheree *v.* Fletcher 84
Faucett *v.* Currier 209
Faulkner *v.* Davis 549
Faulkner *v.* Klamp 206
Fausler *v.* Jones 83
Faust *v.* Haas 9, 210
Favill *v.* Roberts 287
Faxon *v.* Folvey 64
Fears *v.* Brooks 99, 100, 103, 106
Felix (St.) *v.* Rankin 492
Fell *v.* Brown 151
Fellows *v.* Tann 106
Feltham *v.* Clark 168
Fennings *v.* Humphrey 413
Fenwick *v.* Bulman 365
v. Potts 357
Feret *v.* Hill 211
Fergerson *v.* Fergerson 187
Ferguson *v.* Fisk 407, 459, 473
v. Paschall 368
Fernie *v.* Young 440
Ferran's Estate 167
Ferrin *v.* Errol 411
Ferris *v.* Burton 327
v. Henderson 203
v. Mullins 357
Ferson *v.* Sanger 37, 191, 260
Fessler *v.* Hickernell 237, 342
Fessler's Appeal 155
Fettiplace *v.* Georges 101
Fidelity Ins. Co.'s Appeal 55, 574
Field *v.* Magaw 167
v. The Mayor of New York 155, 166
v. Wilson 203
Fields *v.* Squires 367
Filley *v.* Fassett 456
Fillman *v.* Divers 86
Finch *v.* Parker 376
v. Resbridger 575
v. Shaw 264, 501
v. Winchelsea 276
Findlay *v.* Hosmer 341, 343
v. Keim 363
Fink *v.* Mahaffy 338
Finley *v.* Aiken 364, 369, 375
Fireman's Ins. Co. *v.* Powell 184
First National Bank *v.* Bache 86
Fischli *v.* Fischli 113
Fish *v.* Cleland 212, 234
v. Dodge 441
v. Howland 355
v. Leser 376
v. Miller 234
Fisher *v.* Boody 260
v. Brown 359
v. Budlong 213
v. Fields 65
v. Filbert 114
v. Mellan 214
v. Moolick 396
v. Taylor 61

Fisk *v.* Gray 179
v. Sarber 94, 143
Fitch *v.* Fitch 220
v. Weber 317
Fitzgerald, Ex parte 552
v. Vestal 164
Fitzhugh *v.* Maxwell 181
Fitzpatrick *v.* Featherstone 377, 378
Fitzsimmons *v.* Joslyn 218
v. Ogden 264
Flagg *v.* Mann 154, 268, 273, 501
Flamang's Case 435
Flarty *v.* Odlum 166
Flavel *v.* Harrison 456
Fleming *v.* Beaver 336
v. Burgin 273
v. Donahoe 63
v. McHale 81, 258
v. Mershon 424
v. Newton 465
v. Snook 463
Fletcher *v.* Ashburner 307, 308, 313, 319, 325
v. Grover 329
v. Holmes 151, 284
v. Peck 265
Flight *v.* Bollard 377
v. Cook 570
Flinn *v.* Bagley 239
Flitcroft's Case 237
Florence Sewing Machine Co. *v.* Ziegler 243, 267
Flower *v.* Flower 115
Fogarty *v.* Sawyer 151
Foley *v.* Hill 284
v. Kirk 473
Follansbe *v.* Kilbreth 80, 86
Follansbee *v.* Scottish Am. Manf. Co. 407
Follett *v.* Tyall 60
Foll's Appeal 368, 376
Folsom *v.* Marsh 452, 455
Fontain *v.* Ravenal 117, 130, 131
Foose *v.* Whitmore 73
Foot *v.* Ketchum 327
Forbes *v.* Adams 324
Force *v.* The City of Elizabeth 37
Ford *v.* Burleigh 435
v. Dangerfield 88
v. Foster 456
v. Fowler 73
v. Garner 167
v. Lewis 82
v. Olden 257
v. Stuart 167
v. White 264, 272
v. Williams 284
Fordyce *v.* Bridges 77
v. Willis 63
Foreman *v.* Bigelow 239
Forrer *v.* Nash 380
Forrest *v.* Forrest 67, 84
v. Prescott 347
Forrester *v.* Flores 385
Forsbrook *v.* Forsbrook 571
Fortescue *v.* Barnett 67
Fosdick *v.* Schall 43, 344
Foss *v.* Harbottle 239
Foster *v.* Barnes 511
v. Clark 190
v. Foster 61
v. Hale 64
v. Johnson 329
v. Reynolds 159
v. Swasey 37
v. The Trustees 82
v. Wood 409
Foster's Appeal 314, 512
Fothergill *v.* Rowland 462
Foust *v.* Moorman 489
Fowle *v.* Lawrason 484
Fowler *v.* Bott 175
v. Fowler 469, 470
Fowler's Appeal 248, 529
Trust 300, 301
Fox *v.* Davis 115
v. Heffner 80
v. Mackreth, 94, 143, 222, 237, 239
Fraim *v.* Frederick 267
Frampton *v.* Frampton 115
Francis *v.* Francis 352
v. Porter 151
v. Wells 353
Frank *v.* Basnett 414
Frank's Appeal 80, 92, 239
Franklin Ins. Co. *v.* McCrea 37
Franklyn *v.* Tuton 461
Franks *v.* Bollans 314
Frary *v.* Booth 103
Frayne *v.* Taylor 313
Frazer *v.* Brownlow 103
Frazer's Trustees *v.* Center 103
Frederick *v.* Haas 82, 83
Frederick's Appeal 67
Freedley's Appeal 65
Freeland *v.* Cocke 486
v. Dasey 259
Freelty *v.* Barnhart 378
Freeman *v.* Cooke 290
v. Curtis 187, 1 8
v. Dwiggins 230
v. Fairlie 148, 562
v. Freeman 99, 228, 385
v. Hartman 253
v. Lomas 327
v. Pope 243, 245
v. Poutrell 8
v. Stine 527

Fremont *v.* Boling 424
French *v.* Burns 155
v. French 55
v. Griffin 207
v. Macale 180
v. The Loyal Company 274
v. Waterman 103
Frenzel *v.* Miller 213
Frewin *v.* Lewis 437
Frey *v.* Demarest 529
Freyvogle *v.* Hughes 55, 106
Frith *v.* Cartland 86, 139
v. Forbes 351
Frisbie's Appeal 37, 483
Frizzle *v.* Patrick 440
Frost *v.* Beekman 267
Frothingham *v.* Hacker 273
Frye *v.* Partridge 463
Frue *v.* Loring 37
Fuerson *v.* The General Assembly 117
Fulham *v.* McCarthy 231, 237
Fullwood *v.* Fullwood 37
Fulton's Appeal 328
Fulton *v.* Loftis 230
v. Moore 304
Flynn, In re 546

G.

Gable *v.* Daub 295
Gage *v.* Gates 103
v. Abbott 37
v. Griffin 575
v. Schmidt 575
Gaines *v.* Chew 199
v. New Orleans 261, 484
Gaither *v.* Gaither 199
Galbraith *v.* Elder 92, 93
v. Galbraith 385
Gale *v.* Abbott 400
v. Kalamazoo 228
Gallagher *v.* Fayette County R. R. Co. 37
Galland *v.* Galland 113
Gallaton *v.* Cunningham 234
Gallego's Executors *v.* Attorney-General 117, 130
Gallober *v.* Martin 268
Galloway *v.* Finley 353
Galveston R. R. *v.* Cowdry 157, 165
Gamble *v.* Loup 575
Gannett *v.* Albree 42
Gano *v.* Gilruth 501
Garber *v.* Henry 159
Gardner *v.* Adams 166
v. Deiring 432
v. Gardner 103
v. Hooper 110
v. Lachlan 165
Gardner *v.* Newbury 440
Garforth *v.* Bradley 110
Garish *v.* New Bedford Inst. for Saving 66
Garland *v.* Garland 113
v. Harrington 164
Garner *v.* Garner 57, 188
v. Lyles 529
Garnett *v.* Acton 313
v. Macon 348
Garnham *v.* Skipper 357
Garnsey *v.* Mundy 67
Garrard *v.* Lord Lauderdale 68
Garratt *v.* Lynch 176
Garretson *v.* Cole 400
Garrett *v.* White 489
v. Wilkinson 84
Garson *v.* Green 353, 355
Garth *v.* Sir John Hind Cotton 433, 434
v. Townsend 193
Garvin *v.* Williams 234
Garwood *v.* Garwood 272
Gas Company *v.* Broadbent 440
Gaskell *v.* Gaskell 489
Gass *v.* Gass 80
v. Wilhite 122
Gass's Appeal 465
Gatley *v.* Holcomb 207
Gatling *v.* Newell 198
Gaunt *v.* Finney 439, 441
Gause *v.* Hale 58
v. Perkins 436
Gay *v.* Adams 190
v. Gay 327
Gearhart *v.* Jordan 334, 337
Geddes *v.* Pennington 216
Geddes's Appeal 472, 513
Gee *v.* Pritchard 455, 465
Geist's Appeal 168
General Estates Company, In re 170
Genet *v.* Beekman 61
Gentry *v.* McReynolds 114
George *v.* Kent 269
v. Wood 271, 333
Germantown Pass. Railway Co. *v.* Fitler 39, 181
Gerrard *v.* Boden 163
Gerry *v.* Stimson 64, 80
Getman's Ex'rs *v.* Beardsley 196
Gibb *v.* Marsh 77
Gibbes *v.* Cobb 272
Gibbons *v.* Hoag 260
Gibbes *v.* N. Y. Life Ins. Co 231
Gibbs *v.* Harding 115
Gibert *v.* Colt 581
Gibler *v.* Trimble 264
Gibson *v.* Crehore 500
v. Foote 80, 81

Gibson *v.* Goldsmid 367
v. Jeyes 232, 551
v. Rees 68
Giffard *v.* Williams 489
Gifford *v.* Carvill 207
v. New Jersey R. R. Co. 465
v. Thorn 219
Gihon's Estate 293
Gilbert *v.* Chapin 72
v. Groff 290
v. Lewis 100
Gilchrist *v.* Stevenson 67
Gill *v.* Ferris 463
v. McAttee 273
Gillespie *v.* Burleson 100
v. Holland 232
v. Moon 258, 382, 470
Gillett *v.* Bate 527
Gillis *v.* Hall 370
Gillott *v.* Esterbrook 456, 457, 458
Gilman *v.* Bell 527
v. Brown 354
v. Hamilton 130
v. McArdle 64
v. Telegraph Co. 157
v. Wills 157
Girard *v.* Philadelphia 132, 136, 571
Girard Life Ins. Co. *v.* Chambers 61
Girard Life Ins. Co.'s Appeal (Page's Estate) 312
Girard Tsp. *v.* Girard Borough 465
Gladstone *v.* Berley 351
Glascot *v.* Lang 424
Glass *v.* Ellison 151
v. Hulbert 190, 258, 273, 382, 470
v. Pullen 330
Glasscock *v.* Minor 214, 215
Glaze *v.* Drayton 365
Gleaves *v.* Paine 110
Glen *v.* Gibson 47
Glendenning *v.* Johnson 153
Glendon Iron Co. *v.* Uhler 457
Glenn *v.* Clark 295
v. Glenn 103
v. Statler 187, 191
Glenny *v.* Smith 456, 458
Glenorchy *v.* Bosville 57, 65, 468
Glidden *v.* Strupler 293
Glidewell *v.* Spaugh 85, 268
Globe Mut. Life Ins. Co. *v.* Reals 475
Gloucester (Corporation of) *v.* Wood 87
Glover *v.* Fisher 391
v. Glover 113
Glyn *v.* Hood 168
Godard *v.* Ingepenne 8
Goddard *v.* Gardiner 563
v. Sawyer 159
v. Snow 254
Godfrey *v.* Horton 102, 198
v. Littel 503
Godwin *v.* Collins 371
Going *v.* Emery 130
Golden *v.* Maupin 498
Goldsmid *v.* Goldsmid 537
v. Tunb. Wells Imp. Co. 440
Goldsmith *v.* Guild 391, 394
Gollober *v.* Martin 268
Goltra *v.* Sanasack 187
Gomm *v.* Parrott 501
Gompers *v.* Rochester 228
Gompertz *v.* Pooley 409
Gooch *v.* Association for Relief 120
v. Baxter 356
Good *v.* Harris 100
v. Herr 187, 188
Goodburn *v.* Stevens 332, 499, 500, 512
Goodell *v.* Bloomer 575
Goodman *v.* Guerson 153
v. Whitcombe 509
Goodrich *v.* The City of Milwaukee 55
Goodrum *v.* Goodrum 100
Goodson *v.* Richardson 400
Goodyear *v.* Watson 336
Gordon *v.* Brown 180
v. Graham 159
v. Green 65
v. Lewis 327
v. Lowell 181
Gore *v.* Gibson 230
Gorham *v.* Arnold 151, 152
v. Daniels 55
Goss *v.* Lord Nugent 385
v. Tracy 199
Gotwalt *v.* Neal 223
Gough *v.* Crane 368, 385
Gould *v.* Cayuga Nat. Bank 198
v. Gould 110
v. Hayes 529
v. Okeden 198
v. The Mayor of Atlanta 424
Gourley *v.* Woodbury 489
Gout *v.* Alepoglu 456
Gouverneur *v.* Lynch 2
Gover's Case 239
Gover *v.* Hall 486
Gowan *v.* Jeffries 510, 578
Gower *v.* Sterner 190
Gragg *v.* Martin 243
Graham, In re 545
Graham *v.* Hackwith 177, 380
v. Londonderry 108
v. Long 64
v. Maxwell 424
v. Oliver 390
v. Pancoast 219, 230
v. Samuel 271
Grand Chute *v.* Winegar 13, 37

Grand Trunk Railway *v.* Cook 465
Grant *v.* Grant 212
Grantham *v.* Kennedy 198
Gratz *v.* Cohen 250
Graves *v.* Graves 113
v. Rogers 294
Gray *v.* Chiswell 516
v. Fox 141
v. Pentland 564
v. Russell 452
v. Thompson 142
v. Woods 470
Gray de Wilton *v.* Saxon 463
Graydon *v.* Graydon 492
Great Falls Manufacturing Co. *v.* Worster 47, 366, 424
Great Luxemborg Railway Company *v.* Magnay 204, 239
Great North of England Railway Company *v.* Clarence Railway Company 400
Great West. Ins. Co. *v.* Cunliffe 484
Green *v.* Allen 117
v. Canny 400
v. Darling 327
v. Drinker 271
v. Drummond 80, 82
v. Farmer 327
v. Godall 255
v. Johnson 52, 307
v. Keene 527
v. Morris R. R. Company 188
v. Putnam 492
v. Richards 385
v. Rumph 58
v. Slayter 274
v. Smith 287
v. Spalding 37
v. Spring 37
v. U. S. Bank 159
v. White 274
v. Winter 92, 143, 144
Greenaway *v.* Adams 477
Greene *v.* Mumford 424
Greenfield's Estate 66, 167, 231, 236, 237
Greenway, Ex parte 175, 177
v. Greenway 310, 312
Greenwood *v.* Brodhead 520
v. Greenwood 539
v. Spring 239
v. Taylor 341, 343
Greer *v.* Baughman 83
v. Greers 230
Gregg *v.* Von Phul 284
Gregory *v.* Murrell 337
v. Wilson 181
Gregory's Executors *v.* Forrester 486
Gresley *v.* Mousley 198, 203, 232, 260
Gretton *v.* Haward 296
Grey *v.* Grey 84
Greyburn *v.* Clarkson 139
Grieveson *v.* Kirsopp 312
Griffin *v.* Banks 115
v. Cunningham 378
v. Graham 130
v. Griffin 357
Griffith *v.* Beecher 309
v. Godey 230, 237
v. Griffith 100
v. Phillips 499
v. The Frederick Co. Bank 371
v. Wright 282
Griffiths *v.* Robins 232
Grim's Appeal 293
Grimes *v.* Harmon 130, 196
Grimstone, Ex parte 552
Grissell *v.* Swinhoe 302
Groff *v.* Rohrer 190
Grogan *v.* Cooke 527
Gross *v.* Leber 187
Grosvenor *v.* Sherratt 232
Groton Manufac. Co. *v.* Gardiner 165, 358
Grove *v.* Bastard 571
v. Hodges 211
Groves *v.* Webber 575
Grubb's Appeal 37, 468, 483
Grubb *v.* Cottrell 328
Grumley *v.* Webb 94, 210
Grymes *v.* Home 168
v. Sanders 198, 259
Guerand *v.* Dandelet 463
Guernsey *v.* Ins. Co. 258
Guest *v.* Farley 55
v. Smythe 239
Guion *v.* Knapp 333
Gully *v.* Cregoe 72
Gump's Appeal 198, 470
Gunn *v.* Brantley 158
v. Harrison 413
Gunter *v.* Halsey 387
v. Williams 103
Gurnell *v.* Gardner 167, 168
Guthrie *v.* Gardner 82, 84
v. Quinn 284
Gwillim *v.* Stone 477
Gwinther *v.* Gerding 198
Gwynn *v.* Hamilton 187
Gwynne *v.* Heaton 219

H.

Habershon *v.* Vardon 119
Hackett *v.* Alcock 179
v. Reynolds 357
Hackley *v.* Draper 200
Hackney *v.* Butts 80

Hackwith *v.* Damron 268
Haddon *v.* Spader 527
Haden *v.* Ware 188
Hadley *v.* Hopkins Academy 121, 130
v. Latimer 230
v. Pickett 355
v. The Clinton Importing Co. 213
Hagan *v.* Walker 526, 529
Hagar *v.* Brainerd 151
v. Buck 172, 181
Haggerty *v.* McCanna 191
Hahn *v.* The Concordia Society 463
Haigh *v.* Kaye 95, 218
Haight *v.* Day 77
v. McVeagh 103
Haines's Appeal 575
Haines *v.* Allen 120
v. Ellis 103
v. Haines 69
v. Thompson 154
Hains *v.* Beach 151
Haisten *v.* Savannah, etc., R. R. 385
Hale *v.* Everett 465
v. Henrie 513
v. Horne 152
v. Plummer 512
v. Stone 100
v. Wilkinson 374
v. Wilson 505
Haley *v.* Bennett 353
Hall's Appeal 228, 400, 574
Hall *v.* Bliss 94
v. Congdon 80
v. Cushman 335
v. Denckla 151
v. Hall 67, 175, 295, 296, 398 303, 510
v. Hallet 239
v. Hiles 370
v. Joiner 37, 526, 527, 558
v. Jones 356, 364
v. Patterson 198
v. Piddock 407, 489, 491, 492
v. Potter 224
v. Smith 364
v. Timmons 293
v. Tunnell 151
v. Warren 375
v. Waterhouse 101
Hallesy *v.* Jackson 151
Hallett, In re 86
v. Thompson 61
v. Wylie 175
Hallett's Estate 583
Halley *v.* Ball 103
Halliday *v.* Holgate 359
Hallows *v.* Fernie 208
Halls *v.* Thompson 215
Halo *v.* Schick 154
Halsey *v.* Peters 372
v. Trevils 154
Halstead *v.* The Bank of Kentucky 265
Ham *v.* Goodrich 385
Hamaker *v.* Schroers 179
Hamberlin *v.* Terry 199
Hamden *v.* Rise 123
Hamersly *v.* Lambert 516
v. Smith 106
Hamet *v.* Dundas 219
Hamilton *v.* Aslin 190
v. Bishop 99, 100
v. Cummings 473, 474
v. Dunsford 463
v. Lord Mohun 234
v. Marks 421
v. Nutt 272
v. Rogers 165
Hamlin *v.* McGuillicuddy 527
v. Sullivant 196
Hammer *v.* McEldowney 377
Hammersley *v.* De Biel 211
Hammonds *v.* Barclay 351
v. Messenger 173
Hampson *v.* Edelen 365
Hampton *v.* Nicholson 187
Hance *v.* Trawhitt 295
Hancock *v.* Carlton 181
Handley's Ex'rs *v.* Fitzhugh 37
Handy *v.* Noonom 575
Hanford *v.* Blessing 154
Hanland *v.* Myers 113
Hannegan *v.* Hannah 340
Hannewinkle *v.* Georgetown 424
Hanover Fire Ins. Co. *v.* Germania Fire Ins. Co. 400
Hanson *v.* Edgerly 213
v. Gardiner 435
v. Willard 487
Harbers *v.* Gadsden 389
Harbison *v.* Lemon 230
Hardesly *v.* Richardson 385
Hardigree *v.* Mitchum 188
Harding *v.* Egan 191
v. Glyn 73, 74, 77
v. Handy 230
v. Larned 141
v. Parshall 380
Hardraker *v.* Leeby 151
Hardwick *v.* Forbes 200
Hardy, Ex parte 321
v. Martin 463
v. Sproule 332
Harkinson's Appeal 228
Harkinson *v.* Hanbury 157
Harkness *v.* Fraser 232
Harlan *v.* Maglaughlin 246
Harland *v.* Binks 68
v. Trigg 73, 75
Harmer *v.* Gwynne 417

Harnett *v.* Yielding 375
Harp *v.* Calahan 151
Harper's Appeal 157
Harper *v.* Archer 86
v. Ely 151, 157, 268
v. Phelps 75
v. Williams 356
Harris *v.* Arnold 273
v. Barnett 65
v. Ferguson 329
v. Harlan 355
v. Harris 103
v. Knickerbocker 387
v. Parker 94, 239
v. Tyson 213
v. Warner 330, 331
Harrisburg Bank *v.* German 337
v. Tyler 86
Harrison *v.* Deramus 390
v. Eldridge 495
v. Forth 265
v. Guest 219
v. Harrison 72, 73, 263
v. Jameson 190
v. McMennomy 65
v. Stewart 102
v St. Mark's Church 441
v. Town 374
Harrod *v.* Fountleroy 203
Harrold *v.* Lane 80
Hart *v.* Hart 385
v. Herwig 412
v. Ten Eyck 358
v. The Farmers' Bank, 268, 276
v. The Mayor of Albany 435, 440
Hartley's Appeal 155
Harton *v.* Harton 99
Hartopp *v.* Hartopp 217, 235
Hartshorn *v.* South Reading 443
Hartshorne *v.* Hartshorne 495, 501
Hartwell *v.* Smith 330
Hartz *v.* Schrader 514
Harvard College *v.* Amory 141
Harvey's Estate 102, 198
Harvey *v.* Aston 227
v. Harvey 99
v. Kelly 353
v. Mount 235
v. Smith 207
Harwood *v.* Kirby 489
Haskell *v.* Allen 503
Hassan *v.* Day 489
Hastings *v.* Orde 67
v. Cropper 409, 419
Hatch *v.* Cobb 395, 478
v. Dana 239, 527
v. Hatch 234
Hatcher *v.* Hatcher 385
Hathaway *v.* Brady 190
Hathaway *v.* Foy 419
Hauchwout *v.* Murphy 267, 274, 354, 365
Hauley *v.* Tresilian 8
Haven *v.* Adams 274
v. Foster 189
Havens *v.* Sackett 303
Haviland *v.* Bloom 113
Hawkins's Appeal 234, 235
Hawkins *v.* Gardiner 64
Hawksworth *v.* Hawksworth 548
Hawley *v.* Clowes 433, 434
v. Cramer 239
v. James 145, 316
v. Sheldon 377
v. Upton 239
Hay *v.* Alexandria R. R. 37
v. Marshall 482
Hayden *v.* Cabot 331
Haydock *v.* Haydock 231
Hayes *v.* Kershow 66, 67, 69, 373
v. Tabor 55
v. Ward 338
Haygarth *v.* Waring 207, 219
Haymaker's Appeal 243
Hayman's Appeal 210
Hayne *v.* West Hoboken 291
Hays *v.* Hall 365
v. Hays 473
v. Jackson 346
v. Quay 65
Haythorn *v.* Margerem 575
Hayward *v.* Andrews 172
Haywood *v.* Brunswick Build. Soc. 463
v. Cope 374
v. Judson 492
Hazard *v.* Irwin 207, 217
Hazen *v.* Durling 530
v. Thurber 495
Head *v.* Maloney 478
Heager's Executors' Case 92
Healey *v.* Alston 55
Health Dept. *v.* Purdon 440
Healy *v.* Rowan 114
Heard *v.* Pilley 80
Hearle *v.* Greenback 299
Heartley *v.* Nicholson 67
Heath *v.* Jones 191
v. Page 1, 248
v. Williams 155
Heathman *v.* Hall 100
Hebarn *v.* Warner 103
Hebert *v.* Mut. Life Ins. Co. 368
Hecht *v.* Colquhon 37
Heck *v.* Clippenger 99
Heckard *v.* Sayer 393
Hefner *v.* Vandolah 283
Heine *v.* The Levee Commissioners 37
Heist *v.* Baker 353

Heister *v.* Gilmore 154
v. Madeira 154, 183
Helfenstein *v.* Garrard 55
Hellen *v.* Crawford 330
Helm *v.* Darby's Administrators 534
Helme *v.* Philadelphia Life Ins. Co. 291
Helsley *v.* Fultz 42
Hemmer *v.* Cooper 207
Hemming *v.* Maddick 331, 569
Hemmingway *v.* Coleman 219
Hemphill's Appeal 139, 141
Hemphill *v.* Ross 151
Hendershott *v.* Henry 293
Henderson *v.* Burton 534
v. Dickey 191
v. Hays 471
v. Henderson 67
Hendrick *v.* Whittemore 330
Hendricks *v.* Robinson 242, 527
Hendrickson *v.* Hinckley 409
Hendry *v.* Key 422
Henley *v.* Houghtaling 154
Henn *v.* Walsh 509
Henry *v.* Clark 153
v. Deitrick 117, 465
v. Koch 400, 435
v. Raiman 236
Henry's Case 151
Henshaw *v.* Wells 151
Henty *v.* Wrey 256
Hepburn *v.* Auld 389, 391, 394
v. Dunlop 378, 380
v. Lordan 400, 441
v. McDowell 289
Herbert *v.* Wren 298, 495
Hercy *v.* Birch 507
Herr's Estate 143
Herr *v.* Barber 330
Hervey *v.* Smith 400
Herzberg *v.* Irwin 378
Hess's Estate 142, 335
Hetfield *v.* Willey 376
Hetrick's Appeal 230
Heuser *v.* Harris 120
Hewes *v.* Dehor 332
Hewitt *v.* Powers 189
Heyman *v.* European Central Railway Co. 260
Heyward *v.* Cuthbert 498
Hibbard *v.* Eastman 409
Hibernian Society *v.* Ordway 42
Hickman *v.* McCurdy 330
v. Stout 482
Hicks *v.* Compton 436
v. Hastings 503
v. Michael 460
Hidden *v.* Jordan 80
Higgenbottom *v.* Peyton 64
Higgins *v.* Crawford 38
High *v.* Worley 307
Highberger *v.* Stiffler 230, 235
Hill *v.* Barclay 181
v. Beach 515
v. Bishop of Exeter 251
v. Bowie 431
v. Bowman 425
v. Bush 191
v. Campbell 562
v. Epley 282, 284, 291
v. Lackey 177
v. McLaurin 230
v. McRea 61
v. Robertson 151
v. Turner 424
v. White 151
v. Winnie 152
Hillary *v.* Waller 380
Hills *v.* Croll 462
v. Miller 461
Hillyard *v.* Miller 133
Hilton *v.* Eckersley 228
Hinchman *v.* Paterson Horse R. R. Co. 443
Hinckley *v.* Thatcher 122
Hindson *v.* Weatherill 231, 236
Hindustan (Bank of), In re 352
Hine *v.* Handy 407
Hines *v.* Thorn 203
Hinkle *v.* Wauzer 164
Hindsdill *v.* Murray 335, 337
Hirsch *v.* Jonas 456
Hirst's Estate 348
Hitchcock *v.* Harrington 152
v. Skinner 489, 492
Hitchens *v.* Pettingill 469
Hitchins *v.* Congreve 239
Hitchin *v.* Birks 578
Hitchman *v.* Stewart 329
Hitner's Appeal 115
Hitt *v.* Holliday 151
Hoagland *v.* Latourette 365
Hoare *v.* Bremridge 200, 400
v. Osborne 119
Hobson *v.* Trevor 164
v. Sherwood 489
Hocker *v.* Gentry 307
Hockley *v.* Bantock 357
Hoddel *v.* Pugh 365
Hoddy *v.* Hoard 467
Hodge *v.* Att'y-Gen. 52
Hodges *v.* Smith 422
Hodgson *v.* Farrell 219
v. Macy 84
v. Shaw 336
v. Williamson 102, 198
Hodson *v.* Coppard 463
Hoffman *v.* Brooks 228

Hoffman *v.* Harrington 151
v. Johnson 331
v. Livingston 405
v. The Cumberland Coal Co. 239
Hoff's Appeal 348
Hogan *v.* Jaques 90
v. Shayhorn 90
Hogden *v.* Guttery 151
Hoge *v.* Hoge 91, 95, 199
Hoggart *v.* Cutts 422
Hoggatt *v.* Wade 355
Hoghton *v.* Hoghton 231, 233
Hogsett *v.* Ellis 152
Hogul *v.* Curtis 413
Hoigges *v.* Harry 8, 402
Holbrook *v.* Connor 207
Holdane *v.* Cold Spring 290
Holden *v.* McMakin 509, 510, 578
v. Pike 333
Holder *v.* Nunnelly 83
Holderstaffe *v.* Saunders 424
Holdridge *v.* Gillespie 92, 153
Holdship *v.* Patterson 61
Hole *v.* Barlow 429
v. Thomas 433, 434
Holgate *v.* Eaton 376
Holland *v.* Anderson 395
v. Craft 307
v. Hensley 66, 372
v. The Mayor of Baltimore 575
Holliday *v.* Overton 65
Hollingsworth *v.* Floyd 330
Hollis *v.* Hayes 80, 83
Holloway *v.* Headington 69
v. Holloway 457
v. Radcliffe 322
Holman *v.* Loynes 236
Holme's Appeal 376
Holmes *v.* Dring 141
v. Holmes 487
v. Penney 243, 245
v. Powell 268
v. Remson 409
Holroyd *v.* Marshall 165, 358
Holsman *v.* Boiling Spring Co. 440
Home Ins. Co. *v.* Howell 412
Homer *v.* Homer 64, 80
Homfray *v.* Fothergill 507
Honore *v.* Hutchings 81
Honywood *v.* Forster 303
Hood *v.* Oglander 72, 75
Hooker *v.* Pynchon 370
Hooley *v.* Hatton 539
Hooper, Ex parte 357
v. Holmes 64
Hoopes *v.* Dundas 227
Hoover *v.* Epler 338
Hoover *v.* Hoover 346, 534
v. Reilly 187
Hope *v.* Carnegie 424
v. Hayley 165
v. Lawrence 284
Hopkins *v.* Beebe 167, 351
v. Canal Proprietors 576
v. Garrard 273
v. Glunt 72
v. Hopkins 53
v. McLaren 274
Hopkinson *v.* Burghley 455
v. Rolt 159
Hopkirk *v.* Randolph 242, 245
Hopper *v.* Hopper 364, 370
v. McWhorter 284
Hoppiss *v.* Eskridge 166
Horbach *v.* Gray 190
Horberry *v.* Harding 61
Horn *v.* Cole 281, 283, 290
v. Horn 527
v. Keteltas 155, 470
Horne *v.* Lyeth 57
Horner's Ex'rs *v.* McGaughy 538
Horwood *v.* West 73
Hostetter *v.* Vowinkle 456
Hotz's Estate 227
Hough *v.* Richardson 214, 215, 268
House *v.* Falconer 490
Houser *v.* Lamont 154
Houseman *v.* The Building Asso. 268
Houston *v.* Bank 336
v. Embry 100
v. Jefferson College 465
v. Townsend 385
Hout *v.* Hout 194
How *v.* Weldon 221
Howard *v.* American Peace Society 120, 130
v. Carpenter 193
v. Digby 108
v. Edgell 374
v. Harris 151, 153
v. Hudson 291
v. Jones 37
v. Moffatt 110
v. Robinson 151
Howe, Matter of 357
Howe *v.* Howe 230
v. Russell 470
v. Sheppard 327
Howell's Appeal 424
Howell *v.* Ashmore 562
v. Howell 84
Howey *v.* Goings 487
Hoxie *v.* Carr 80, 511
v. Home Ins. Co. 284, 286
Hoyt *v.* Story 167
v. Tuxbury 376, 378

Hubbard *v.* Goodwin 60, 82
v. Harrison 152
v. Jasinski 410
v. Long 268
v. Martin 189
v. Shaw 157
Hubbell *v.* Meigs 207
v. Moulson 157
v. Van Schœning 376
Hubble *v.* Perrin 515
Huber's Appeal 55
Huckenstine's Appeal 441
Hudnal *v.* Wilder 252
Hudson *v.* Barrett 508
v. Cork 313
v. Wheeler 203
Huff *v.* Shepard 377
Huger *v.* Huger 143, 549
Hughes, Ex parte 239
Hughes Hallett *v.* Indian Mammoth Gold Mines Co. 569
Hughes *v.* Boyd 227
v. Directors 181
v. Kearney 355
v. Littlefield 337
v. Morris 385
v. Peters 103
v. Sheaff 154
v. United States 268, 474
Huguenin *v.* Baseley 67, 230, 231, 237
Hull *v.* Sturdivant 370
Hulme *v.* Tenant 97, 102, 103, 104, 108
Humane Fire Co.'s Appeal 123
Humbertson *v.* Humbertson 58
Humphrey *v.* Matoon 203
Humphries *v.* The Little Sisters 121
Hundley *v.* Mount 271
Hunt's Appeal 312
Hunt *v.* Bass 138
v. Blanton 260
v. Danforth 13
v. Freeman 410
v. Hamilton 199
v. Hunt 115
v. Moore 214, 230
v. Mortimer 167
v. Rousmanier 167, 187
v. Rowland 42
Hunter's Appeal 426
Hunter *v.* Hatch 154
v. Hubbard 147
v. McLaughlin 207
v. Stembridge 73
Huntly *v.* Huntly 67
Huoncker *v.* Miskey 154
Hurd *v.* Hall 190
Hurlbutt *v.* Butenop 274
Hurst *v.* Beach 539
Hurst's Lessee *v.* M'Neil 52
Husband *v.* Epling 103
Huson *v.* Wallace 92
Huss *v.* Morris 190, 194, 258
Husted's Appeal 284
Huston's Appeal 337
Hutcheson *v.* McNutt 377
Hutchins *v.* Carleton 160
v. Heywood 52, 55, 60
v. Hope 486
v. King 152
v. Lee 64
v. McCauley 330
Hutchinson *v.* Ford 165
v. Green 424
v. Hutchinson 86
v. Tindall 230
Hutchinson and Tenant, In re 72
Hutton *v.* Duey 115
Hyde *v.* Tanner 471
Hyer *v.* Little 230
Hylton *v.* Hylton 234
Hyman *v.* Kelly 151
Hyndman *v.* Hyndman 93

I.

Ibbitson, In re 310
Iddings *v.* Iddings 258
Iglehart *v.* Armiger 354, 356
v. Gibson 376
Imlay *v.* Huntingdon 103, 114
v. Norwich, &c., R. R. Co. 449
Inbusch *v.* Farwell 515
Inchbald *v.* Barrington 441
Inchiquin *v.* French 65
Inderwick *v.* Inderwick 65
Ingersoll's Appeal 55
Inglis *v.* Sailors' Snug Harbor 117, 126
Ingram *v.* Fraley 75
v. Kirkpatrick 68
Innis *v.* Templeton 293
Insurance Co. of Pennsylvania *v.* Phœnix Ins. Co. 167
International Bank *v.* Wilshire 160
Ireland (Bank of) *v.* Perry 351
Irick *v.* Black 37, 335, 338
Irnham *v.* Child 155
Ironmongers' Co. *v.* Att'y-Gen. 128
Irvine *v.* Campbell 353
v. Sullivan 72
v. Young 485
Irving *v.* Hughes 423
v. Thomas 215
Irwin *v.* Harris 92
v. Irwin 199
v. Ivers 80
v. Tabb 159
Irwin's Appeal 146
Isham *v.* Bennington Iron Co. 271

Isler *v.* Baker 509
Iverson *v.* Wilburn 191
Ives *v.* Armstrong 393
v. Ashley 94
v. North Canaan 284
Ivory *v.* Burns 64, 65

J.

Jackman *v.* Mitchell 249
v. Ringland 80, 83
Jackson *v.* Burgot 261
v. Carey 55
v. Carswell 151
v. Cleveland 90
v. Eyres 153
v. Feller 84
v. Jackson 511
v. Hill 110
v. Leek 272
v. Lodge 152
v. Matsdorf 84
v. Morse 82
v. Myers 55
v. Petrie 581
v. Phillips 116, 117, 119, 120 123, 124, 126, 127, 128
v. Pierce 55
v. Town 245
v. Waldron 162
v. Walsh 239
v. Warren 151, 274
v. Willard 151, 152
Jacobs *v.* Amyatt 100
James *v.* Gibbs 110
v. Marant 103
v. Morgan 219
v. Rice 357
v. Scott 570
Jamison *v.* Brady 99, 100
v. Glascock 143
January *v.* Martin 219
Jaques *v.* Millar 395
v. The Methodist Church 103
v. Weeks 153, 268
Jarden *v.* Phil., Wil. & Balt. R. R. Co. 437
Jarrold *v.* Houlston 452
Jarvis *v.* Brooks 518
v. Chandler 424
v. Dutcher 357
v. Prentice 100
Jefferson *v.* Bishop of Durham 430
Jefferys *v.* Jefferys 373
Jeffreys *v.* Jeffreys 69
Jeffries *v.* Evans 170, 327
Jenison *v.* Graves 80, 83
Jenkins *v.* M'Conico 103
v. Pye 220, 231, 235
Jenkins *v.* Walter 139
Jenks *v.* Fritz 190
Jenkyn *v.* Vaughan 245
Jenner *v.* Jenner 235
Jennings *v.* Baddeley 509
v. Boughton 215
v. Jennings 111
v. Moore 194
Jermyn *v.* Moffit 166, 167
Jerome *v.* Ross 436
Jersey (Earl of) *v.* Dock Co. 355
Jervis *v.* Bruton 228
v. Smith 395, 478
Jervoise *v.* Duke of Northumberland 57
Jesus College (Case of) 121
John (St.) *v.* Benedict 371
Johns *v.* James 68
v. Norris 42, 392
v. Reardon 342
Johnson *v.* Babcock 166
v. Ball 65
v. Blake 155
v. Brooks 369
v. Cawthorne 356
v. Clarkson 65, 88
v. Clifford 187
v. Conger 377
v. Cornett 152
v. Cummins 102
v. Cushing 193
v. Dougherty 86
v. Fesemeyer 236
v. Fox 37
v. Gallagher 102
v. Glancey 478
v. Houston 151
v. Hunt 224
v. Jones 198
v. Johnson 260, 329, 390, 432
v. Mayne 130
v. Neaton 139
v. Quarles 83
v. Railroad Co. 375
v. Richardson 159
v. Rickets 370
v. Rowlands 72
v. Ruse 61
v. Shrewsbury and Birmingham R. R. Co. 377, 464
v. Smith 67
v. Somerville 260
v. Stear 359
v. Wyatt 441, 477
Johnson's Executors *v.* Ketchum 486
Johnston *v.* Glancey 385
v. Gray 153
v. Hubbell 385
v. Zane's Trustees 61

Johnstone *v.* Beattie 544
Joliffe *v.* Baker 204, 214
Jones's Appeal 103, 146
Jones, Estate of J. H. 342
Jones *v.* Bamford 268
v. Beach 471
v. Bolles 198
v. Boston Mill Corp. 370
v. Bullock 484
v. Caldwell 323
v. Clifford 376
v. Creveling's Executors 539
v. Croucher 252
v. Fox 37
v. Foxall 142
v. Gilham 422
v. Green 527
v. Gregory 199
v. Hardesty 170
v. Jones 297, 333
v. Lock 67
v. Lockart 100
v. McKee 199
v. Meredith 151
v. Morgan 57
v. Myrick 333
v. Neale 512
v. Newhall 37, 377, 385
v. Noble 377
v. North 463
v. Noy 509
v. Powell 495
v. Reese 61
v. Smith 202, 269, 359
v. Tapling 441
v. Templeton 293
v. Watkins 189
v. Williams 124
v. Zollicoffer 264
Jope *v.* Morshead 489
Jordan *v.* Cooper 2, 44
v. Deaton 377
v. Elliott 230
v. Sawkins 470
Joslyn *v.* Wyman 159
Jouzan *v.* Toulmin 191, 206
Jow *v.* Hodges 55
Joyce *v.* De Moleyns 264
Joynes *v.* Statham 371
Jubber *v.* Jubber 65
Judson *v.* Corcoran 264, 171
Justice *v.* Wynne 168
Juvenal *v.* Jackson 267

K.

Kamena *v.* Huelbig 170
Kane *v.* Bloodgood 203
v. Gott 307
v. Vanderburgh 431, 460
Kane Co. *v.* Herrington 80, 293
Kannady *v.* McCanon 151
Kansas Valley Bank *v.* Rowell 159
Kauffman's Appeal 364
Kay *v.* Scates 53, 55, 575
Kean *v.* Johnson 465
Keane *v.* Wheatley 455, 477
Kearney *v.* Jeffries 557
v. MacComb 297, 299
v. Saseer 258
v. Vaughan 549
Keates *v.* Lyon 263
Keating *v.* Orne 283
Keech *v.* Sandford 92
Keeler *v.* Eastman 432
v. Taylor 228
Keen *v.* Coleman 293
v. Hartman 293
v. Jordan 176
Keenan *v.* The Missouri Ins. Co. 268
Keene's Estate 55
Keeton *v.* Spradling 37
Keffer *v.* Grayson 374
Kehoe *v.* Kehoe 122
Keily *v.* Monck 226
Keisselbrack *v.* Livingston 258, 382
Keith *v.* Globe Ins. Co. 190
v. Horner 166, 357
v. Trapier 498
Kekewich *v.* Manning 67
Keller *v.* Auble 93
Kelley *v.* Stanberry 268
Kellogg *v.* Smith 269
Kellum *v.* Smith 80, 154
Kelley *v.* Bradford 378
v. McGuire 219
v. Ruble 333
v. Wagner 287
Kemble *v.* Kean 228, 462
Kemp *v.* Kemp 52
v. London & Brighton Rd. 437
v. Pryor 37
v. Sober 461, 463
Kempshall *v.* Stone 395, 478
Kempson *v.* Ashbee 230
Kendall, Ex parte 342
v. Almy 377
v. Honey 498
v. Mann 83
Kennard *v.* George 196
Kennedy *v.* Daly 265
v. Fury 52
v. Green 268
v. Kennedy 235, 474, 509
v. Strong 139
v. Tiernay 166
v. Ware 67, 69, 169, 373
Kenny *v.* Udall 110
Kensington, Ex parte 357
Kensington (Lord) *v.* Phillips 377
Kent *v.* Matthews 338
v. Riley 245

Kent *v.* The Freehold Land and Brickmaking Co. 239
Kenton Furnace R. R. Co. *v.* McAlpin 13
Keokuk (City of) *v.* Love 330
Kepler *v.* Davis 143
Ker *v.* Wauchope 297
Kerns *v.* Swope 268, 271
Kerr's Appeal 465
Kerr *v.* Day 313, 364
v. Gilmore 154
v. The Corporation of Preston 424
v. The Steamboat Co. 484
v. Trego 465
Kerrich *v.* Bransby 199
Kershaw *v.* Thompson 403
Ketcham *v.* Brazil Block Coal Co. 420
Ketchum *v.* Duncan 293
Kettlewell *v.* Barstow 561
v. Watson 268
Key *v.* Griffin 305
Keys *v.* Test 267, 268
v. Williams 357
Keyser *v.* Mitchell 61
Keyzey's Case 332, 348
Kibbe *v.* Dunn 152
Kidd *v.* Horry 466
v. Temple 151
Kidder *v.* Barr 385
Kidney *v.* Coussmaker 306
Kilgannon *v.* Jenkinson 578
Killian *v.* Badgett 230
v. Effingham 421
Kilpatrick *v.* Davidson 64
v. Kilpatrick 546
v. McDonald 37, 86
v. Strizier 189
Kilpin *v.* Kilpin 65
Kimbal *v.* Grafton Bank 37
Kimball *v.* Ætna Ins. Co. 211
v. Morton 64
v. Reding 139
v. Tooke 376
Kimberley *v.* Fox 575
v. Jennings 228, 462
Kimm *v.* Weippert 103
Kimmel *v.* McRight 82
Kimmell *v.* Willard 151
Kincaid *v.* Conly 198, 201
v. Dormey 288
Kiney *v.* Basch 457
King *v.* Baldwin 339, 409, 484
v. Bardeau 389
v. Bill 274
v. Cushman 92
v. Denison 65, 88
v. Hamilton 81, 86, 376
v. Hamlet 220
v. Jenkins 52
King *v.* King 300, 578
v. Marrisal 527
v. McVikar 342
v. Miller 441
v. Mitchell 87
v. Morford 371
v. Payan 37
v. Roney 194
v. Ruckman 364, 377, 389, 393
v. Savery 236
v. Talbot 139, 140
King of Spain *v.* Hallett 564
King of Two Sicilies *v.* Wilcox 562
Kingsbury *v.* Burnside 64, 80
Kingston (Duchess of) Case 281, 294
Kinnaird *v.* Miller's Ex'rs 117
Kinney *v.* Redden 376
Kinsley *v.* Clarke 460
Kintzing *v.* McElrath 213
Kipp *v.* Bank of New York 86, 139
v. Denniston 146
Kirby *v.* Harrison 475
v. Taylor 234
Kirk *v.* Clark 244
v. Hartman 290
Kirkman *v.* The Bank 335
v. Vanlier 482
Kirkpatrick *v.* Bonsall 223
v. Davidson 64
Kirksey *v.* Fike 370
Kirwan *v.* Cullen 231
Kisler *v.* Kisler 66, 80
Kisor's Appeal 465
Kisterbock's Appeal 201, 204
Kistler's Appeal 80, 83, 210, 218
Kline *v.* Kline 231, 253, 255
Kline's Appeal 84
Klock *v.* Walter 155
Klopenstein *v.* Mulcahy 216
Klopp *v.* Lebanon Bank 335
Knatchbull *v.* Hallett 583
Knight *v.* Boughton 65, 71, 74, 76
v. Knight 76
v. Selby 65
Knott, Ex parte 264
v. Morgan 456
Knowles *v.* Lawton 160
Knowlton *v.* Walker 151
Knox *v.* Easton 151
v. Jordan 103
v. New York 439
Koch's Appeal 37
Koenig's Appeal 55
Koockogey *v.* Flewellen 37
Kortright *v.* Buffalo 168
Kost *v.* Bender 207
Kountz *v.* Kirkpatrick 164
Kramer *v.* Arthurs 264
Kreiser's Appeal 304

Krider *v.* Lafferty 268, 273
Kruse *v.* Steffens 94
Kuelkamp *v.* Hidding 217
Kuhl *v.* Mayor of Jersey City 290
Kuhn *v.* Newman 55
v. Rumpp 155
Kuhne *v.* Law 518
Kunkle's Appeal 42
Kunkle *v.* Wolfenberger 154
Kyle *v.* Barnett 142
v. Frost 37
Kymburley *v.* Goldsmith 8, 361
Kyner *v.* Kyner 338

L.

Lacey, Ex parte 239
v. Hill 517
Laclede Bank *v.* Schuler 167
Lacon *v.* Allen 357
v. Briggs 39
Ladd *v.* Harvey 577
Ladley *v.* Creighton 358
Ladue *v.* Railroad Company 159
Laidlaw *v.* Organ 206, 213
Laird's Appeal 310
Laird *v.* Birkenhead Railway Co. 377
Lake *v.* Gibson 41, 512
v. Meacham 258
Lamb *v.* Harris 191
Lamb's Appeal 142
Lamont *v.* Stinson 268
Lammon *v.* Hartsook 288
Lampet's Case 162
Lamson *v.* Drake 151
v. Moffatt 165
v. Sutherland 158
Lancaster *v.* Dolan 103, 251, 261
Landes *v.* Brant 268, 273
Lane's Appeal 527
Lane *v.* Ewing 67
v. Newdigate 400, 464
v. Page 256
Lang *v.* Waring 512
Langdale *v.* Briggs 571
Langdon *v.* Woolfolk 365
Langford *v.* Barnard 150
v. Perrin 330
Langstaff *v.* Fenwick 212
Langton *v.* Horton 165
v. Waring 167
Lanning *v.* Smith 43
Lansdale *v.* Smith 203
Lansdown *v.* Lansdown 187
Lansing *v.* Eddy 409
v. Starr 38, 203
Larkins *v.* Rhodes 83
Larrabee *v.* Larrabee 220
Larrowe *v.* Beam 264, 501
Lassiter *v.* Dawson 110
Latham *v.* Henderson 81, 82
Lathrop and Dale's Appeal 336
v. Gilbert 86
Latrobe *v.* Tiernan 146
Laurens *v.* Lucas 378
Laverly *v.* Moore 365
Law *v.* Grant 213
Lawes *v.* Bennett 313, 321
Lawley *v.* Hooper 197
Lawrence *v.* Blow 330
v. Campbell 563
v. Clark 249
v. Hammett 504
v. Lawrence 294
v. Luber 284
v. Saratoga Lake Rd. Co. 377
v. Tucker 159
Lay *v.* Brown 110
Laycock *v.* Johnson 351
Lavarus *v.* Bryson 94, 239
Leach *v.* Ansbacher 294, 268
v. Beatie 492
Leacrayft *v.* Heddon 103
Leaird *v.* Smith 392
Leake *v.* Robinson 88
Leaming *v.* Wise 39
Lear *v.* Chauteau 372
Learned *v.* Holmes 200
Leather Cloth Co. *v.* Lorsont 228
Leather Cloth Co. *v.* American Cloth Co. 456, 458, 465
Leavitt *v.* Beirne 61
Lechmere *v.* Earl of Carlisle 536
Ledyard *v.* Butler 251
v. Johnson 529
v. Phillips 187
Lee *v.* Hollister 242
v. Howe 390
v. Jones 205
v. Kirby 219, 374
v. Lee 327
v. Overstreet 179
v. Prieaux 100
v. Reed 562
v. Stone 158
Lee's Administrators *v.* Reed 486
Leech *v.* Schweder 461
Leeds *v.* Amherst 287
Leeds *v.* Corp. of New Radnor 504
v. Powell 504
Leek *v.* Cowley 190
Leele *v.* Pilgrim Cong Soc. 441
Leeper *v.* Hersman 283
Lees *v.* Wetmore 575
Lefevre's Appeal 513
Lefferson *v.* Dallas 385
Legard *v.* Hodges 119
Legg *v.* Asgill 119

Legg *v.* Goldwire 58
Leggett *v.* Dubois 60, 82, 83
v. Hunter 145
v. Perkins 55
Lehigh Valley Rd. *v.* Woodring 166
Lehman *v.* Roberts 575
Lehr *v.* Beaver 114
Leiby *v.* Wolfe 271
Leigh *v.* Crump 371
Leiper's Appeal 309
Executors *v.* Irvine 309
Leisenring *v.* Black 94
Le Marchant *v.* Le Marchant 72
Lench *v.* Lench 86
Le Neve *v.* Le Neve 262, 263, 268, 269, 272
Lenning's Estate 348
Leonard's Lessee *v.* Diamond 55
Le Page *v.* McNamara 130
Le Roy *v.* Corp. of New York 424
Lesesne *v.* Witte 72
Leslie *v.* Guthrie 165
Lessig *v.* Langhow 42
Lester *v.* Kinne 385
Letcher *v.* Letcher 83
Letton *v.* Gooden 418
Leuty *v.* Hillas 191
Leverton *v.* Waters 489
Leverty *v.* Moore 288
Levick *v.* Brotherline 216
Levy *v.* Bank of United States 2
v. Levy 133, 136
Lewin's Trusts, In re 110
Lewis and Nelson's Appeal 42
Lewis *v.* Adams 100
v. Baird 271
v. Elrod 100
v. Ford 289
v. Herndon 378
v. Lewis 191, 196
v. Lores's Heirs 251
v. Mathews 100
v. McLemore 214
v. Mew 274
v. Nagle 151
v. Palmer 335
v. Pead 220
v. Reid 145
v. Spencer 421
v. Tobias 447
v. White 83
v. Yale 103
Libby *v.* Rosekrans 576
Liberty Bell, The 424
Lickbarrow *v.* Mason 252
Liddard *v.* Liddard 76
Liddell's Executors *v.* Starr 578
Lidderdale *v.* Montrose 166
v. Robinson 336
Life Association of Scotland *v.* McBlain 200
Life Association of America *v.* Bougher 465
Life Ins. Co. *v.* Bangs 409
Lightner's Appeal 66
Lightner *v.* Mooney 271
Liley *v.* Hey 116
Lillard *v.* McGee 245, 526
v. Turner 103
Lillia *v.* Airey 527
Lilly *v.* Kroesen 486
Lincoln *v.* Rutland R. R. Co. 419
Lindaur *v.* Cummings 155
Lindsay *v.* Gibbs 165
v. Harrison 106
v. Jackson 327
v. Pleasants 315
Lindsey *v.* Lindsey 217
v. Rankin 265
Lindsley *v.* Ferguson 202
Lines *v.* Darden 72, 73
Lingen *v.* Simpson 507
Linker *v.* Smith 253
Linn *v.* Neldon's Administrators 409
v. Evans 527
Lippincott *v.* Evans 527
v. Mitchell 100, 103
v. Whitman 258
Liptrot *v.* Holmes 55
Lisle *v.* Liddle 474
Litchfield, In re 517
v. Ballou 37
Little *v.* Brown 355
Litton *v.* Baldwin 103
Livermore *v.* Aldrich 83
Liverpool Association *v.* Fairhurst 293
Liverpool, etc., Co. *v.* Hunter 424
Liverpool Wharf *v.* Prescott 288
Livezey's Appeal 55
Livingston *v.* Dean 171
v. Hubbs 202
v. Livingston 114, 177, 354, 504
v. Newkirk 346
v. Reynolds 432
v. Tomkins 181
Llewellyn *v.* Mackworth 298
Lloyd *v.* Brewster 259
v. Brooks 67
v. Dimmack 569
v. Galbraith 333, 337
v. London, Chatham, and Dover Railway 463
v. Lynch 89, 83, 93
v. Wait 151
Lobdell *v.* Baker 205
Lock *v.* Fulford 333
Locke *v.* American Ins. Co. 213

Locke *v.* Whiting 258
Lockwood *v.* Ewer 359
Logan *v.* Logan 113
v. Simmons 253, 254, 255
Lohman *v.* Crouch 43
Loker *v.* Rolle 37
Lomax *v.* Ripley 65, 87
London *v.* London 499
London Bank of Australia *v.* Lempriere 102
London, etc., R. R. *v.* Lancashire, etc., R. R. 435
London (Mayor of) *v.* Hedger 432
Logue's Appeal 198
Long's Appeal 37, 489
Long *v.* Hartwell 190
v. Kasebeer 436
v. Majestre 482
v. Perdue 95
v. White 99
v. Wier 303
v. Woodman 211
Longley *v.* Griggs 330
Longwell *v.* Bentley 489
Longwood Valley R. R. Co. *v.* Baker 400
Loog *v.* Bean 467
Loomer *v.* Wheelwright 160
Loomis *v.* Loomis 169
Lord's Appeal 383
Lord *v.* Jeffkins 220
v. Lord 298
Lord Cranstown *v.* Johnstown 47
Lord Kensington *v.* Phillips 377
Lord Manners *v.* Johnson 461, 463
Lord Portarlington *v.* Soulby 412, 424
Lorillard *v.* Custer 307
Loring *v.* Loring 72
Lorings *v.* Marsh 117, 130
Loss *v.* Obry 190
Lottimer *v.* Lord 576
Loucheim Bros's Appeal 249
Louden *v.* Blythe 230
Louisville (Bank of) *v.* Hall 512
Louvalle *v.* Menard 492
Love *v.* The Sierra Nevada Mining Co. 194
v. Watkins 370
Lovell *v.* Galloway 37, 558
v. Minot 141
Loveridge *v.* Cooper 168
Lovett *v.* Lovett 574
Loving *v.* Hunter 57
Low *v.* Holmes 489
v. Pew 165
Lowe *v.* Allen 189
v. Baker 424
v. Lowry 417
v. McLeod 114
Lowe *v.* Peers 224
v. Trundle 214
Lowell's Appeal 121
Lowell *v.* Daniels 293
Lowenstein *v.* Beirnbaum 581
Lowndes *v.* Bettle 435, 436
Lowry *v.* Commercial Bank 263
v. McGee 80
Spear 220
Lowther *v.* Carlton 265
Lloyd *v.* McCaffrey 167
Lozear *v.* Shields 230
Lozier's Executors *v.* Van Saun's Administrators 421
L'Strange *v.* L'Strange 166
Lucas *v.* Atwood 515
v. Lockart 72
v. Nichols 411
Luckett *v.* Williamson 380, 385
Ludington *v.* Elizabeth 575
v. Ford 191, 196
Ludlam *v.* Buckingham 376
Ludlow *v.* Simond 484
Ludwig *v.* Highley 276
Luff *v.* Pope 167
Lukens *v.* Sturtevant 443
Lukens's Appeal 139
Lumley *v.* Wagner 462, 464
Lunn *v.* Thornton 165
Lupton *v.* Janey 485, 486
v. Lupton 329
Lush's Trusts 110
Lusk *v.* Lewis 88
Lyde *v.* Mynn 165
Lyle *v.* Ducomb 159
Lyman *v.* Little 470
v. United Ins. Co. 196
v. Utica Ins. Co. 191
Lyme *v.* Allen 407, 409
Lynch *v.* Willard 484
Lyne's Executors *v.* Strouse 103
Lynn *v.* Culbertson 223
v. Gephart 307
Lyon's Appeal 407, 426, 432
Lyon *v.* Home 231
v. Sanders 187

M.

Macaulay *v.* Philips 113
Macbryde *v.* Weekes 393
Maccubbin *v.* Cromwell 64
MacDonough's Executors *v.* Murdoch 49, 50, 51
MacGregor *v.* MacGregor 47
Machier *v.* Burroughs 103
Mack's Appeal 66
Mack *v.* Wetzlar 151
MacKason's Appeal 61

Mackey *v.* Martin 210
Mackreth *v.* Symmons 353, 354, 355, 356, 364
MacNeil *v.* Magee 370
Macoupin Co. *v.* The People 219
Maddox *v.* Maddox 226, 227
Madeira *v.* Hopkins 377
Madison Av. Church *v.* Madison Av. Church 37
Madison Co. *v.* The People 219
Maddison *v.* Alderson 383
Maffit *v.* Rynd 64, 155, 159, 470
Magill *v.* Brown 117, 120, 123, 134, 136
Magnay *v.* Mines Royal Co. 409
Magruder *v.* Peter 356
Maguire *v.* Maguire 542, 544, 546
Magwood *v.* Johnston 103
Mahan *v.* Mahan 69
v. Smith 236
Mahanna *v.* Blunt 385
Maher *v.* Hibernia Ins. Co. 191
Mahon *v.* Fawcett 328, 337
Mahoney *v.* Middleton 273
Mahorner *v.* Harrison 82
Malim *v.* Keighley 65, 73
Malin *v.* Malin 364
Malins *v.* Brown 385
v. Freeman 376
Malliliew *v.* Hodgson 294
Mallet *v.* Butcher 411
Malloney *v.* Horan 291
Mallory *v.* Leach 205
v. Vanderheyden 103
Malloy *v.* Malloy 80
Mammoth Vein Coal Co.'s Appeal 440
Manchester *v.* McKee 527
Manchester Cotton Mills *v.* Town of Manchester 437
Manchester Railway Co. *v.* Worksop Board of Health 400
Manchester *v.* Commercial Bank 465
Mandeville *v.* Solomon 80
v. Welch 166
Manes *v.* Durant 253, 255
Manhattan B. & M. Co. *v.* Thompson 103
Manhattan Manufacturing Co. *v.* New Jersey Stock Yard Co. 400
Manly *v.* Slason 355
Mann *v.* Betterly 230
v. Darlington 249
v. Falcon 151, 152
Manners *v.* Manners 489
Manning *v.* Albee 207
v. Lechmere 258
v. Manning 142, 144
v. Markel 151
Manser's Case 187
Mantz *v.* Buchanan 499
Manufacturers' Bank *v.* Hazard 290
Manzy *v.* Manzy 102
Maple *v.* Kussart 284
Mapps *v.* Cooper 411
Marble Co. *v.* Ripley 362, 377, 508
Marburger *v.* Pott 338
Marbury *v.* Madison 564
March *v.* Eastern Railway Co. 465
Marcy *v.* Dunlap 42
Margetts *v.* Barringer 100
Marine Bank *v.* Fulton Bank 139
Marine Ins. Co. *v.* Hodgson 175, 409
Markham *v.* Guerrant 61
Marks *v.* Pell 470
Marlborough (Duke of) *v.* Godolphin 77
Marr's Appeal 217
Marriott *v.* Sam Badger 295
Marsden's Trusts 256
Marsh *v.* Fairbury & N. R. R. 376
v. Falker 214
v. Lee 152, 158, 159
Marsh *v.* Marsh 86, 346
v. Pike 336
v. Reed 418
Marshall *v.* Billingsly 230
v. Means 166
v. Ross 456
v. Rutton 102
v. Stephens 103
Marston *v.* Rowe 575
Martin, In re 235
Martin *v.* Bell 100
v. Berens 258
v. Graves 474
v. Greer 86
v. Jordan 207
v. Martin 80, 85, 230
v. Morris 210
v. N. Y., S. & C. Rd. 189
v. Nutkin 463
v. Sale 272
v. Sedgwick 168
v. Wynkoop 143
v. Zellerbach 282
Marvin *v.* Bennett 389
v. Brooks 484
Marvine *v.* Drexel 464
Maryland *v.* Northern R. R. Co. 433
Mason *v.* Bogg 341, 343
v. Connell 509
v. Limbury 71, 73
v. Lord 329
v. Wait 145
Massee *v.* Snead 541
Massey *v.* Allen 242
v. Bowen 100
v. Parker 105
v. Sherman 73

Massie *v.* Watts 366
Masson's Appeal 395, 478
Master *v.* Hansard 463
v. Kirton 509
Masterton *v.* Beers 206, 216
Mastin *v.* Halley 377
v. Marlow 220
Mather *v.* Scoles 385
Matthewman's Case 102
Matthews' Appeal 93
Matthews *v.* Aiken 337
v. Baxter 230
v. Dragaud 92
v. Jarrett 377
v. Skinker 465
v. Ward 53, 55, 60
Mattingly *v.* Nye 245
Mattix *v.* Weand 355
Mattock *v.* Glover 187
Mattocks *v.* Tremain 581
Matyr *v.* Lawrence 400
Maul *v.* Rider 91
Maundy *v.* Maundy 199
Maunsell *v.* White 211
Maupin *v.* McCormick 353
Maure *v.* Harrison 337
Maurer's Appeal 103
Maury *v.* Haruck 81
Maxon *v.* Scott 103
Maxton *v.* Gheen 223
Maxwell *v.* Hogg 457, 465
v. Kennedy 203
v. Maxwell 299
v. Pittinger 230
May *v.* Frazee 145
v. Le Claire 295
Maybin *v.* Coulan 42
v. Kirby 171
Mayburry *v.* Brien 60
Mayenborg *v.* Haynes 290
Mayer's Appeal 400
Mayer *v.* Mayor of New York 191
v. Williams 251
Maynard *v.* Railey 509, 510, 577
Mayor *v.* Elliott 136
v. Williams 67, 268
Mayor of Baltimore *v.* Appold 435
Mayor of Basingstoke *v.* Lord Bolton 504
Mayor of Berwick *v.* Murray 329
Mayor of Beverly *v.* Att.-Gen. 132
Mayor of Frederick *v.* Groshon 436
Mayor of London *v.* Hedger 432
Mayor of Lyons *v.* Advocate-General of Bengal 128
Mayor of York *v.* Pilkington 424, 503
Mayou, Ex parte 517
Mays *v.* Dwight 191
Mays *v.* Rose 577
v. Taylor 37
McAdams *v.* Cates 213
McAleer *v.* Horsey 207
v. McMurray 239
McAllister *v.* Commonwealth 86, 139
McAlpine *v.* Burnett 353
McAndrews *v.* Bassett 457
McAninch *v.* Laughlin 187
McArthur *v.* Franklin 151
McAuley *v.* Wilson 130
McBee, Ex parte 370
v. Loftis 267
McBlair *v.* Gibbes 42, 248
McBride *v.* Smyth 106
McCabe *v.* Crosier 376
McCaffrey's Appeal 439
McCaffrey *v.* Woodin 165
McCall *v.* Davis 198, 217
McCallum *v.* The Germantown Water Co. 440
McCammon *v.* Pettitt 83
McCandless *v.* Engle 198, 230
McCarthy *v.* McCarthy 237
McCartney *v.* Bostwick 52
McClellan *v.* McClellan 64
v. Scott 208
McClerkin *v.* Thompson 154
McClure's Appeal 307
McClurg's Appeal 228, 463
McCollum *v.* Morrison 400
McComas *v.* Easeley 371
McConkey *v.* Smith 424
McCord *v.* Iker 440
v. Ochiltree 130, 542
McCormick's Appeal 515
McCormick *v.* Grogan 72, 199
v. Malin 232
McCorquodale *v.* Bell 563
McCourtney *v.* Sloan 37
McCrae *v.* Hollis 190
McCray *v.* Clark 268
McCreight *v.* Foster 364, 365
McCrocklin *v.* McCrocklin 115
McCrory *v.* Foster 86
McCue *v.* Johnston 385
McCulloh *v.* Dashiell 518
McCullough's Appeal 227
McCullough *v.* Irvine 432
v. Walker 37
v. Wilson 293
McCune *v.* Bell 337
v. Belt 335
McDavit *v.* Pierrepont 376
McDermot *v.* Laurence 513
v. Strong 527
McDole *v.* Purdy 353
McDonald *v.* Mass. Hospital 120

McDonough *v.* Gaynor 581
v. Murdoch 49, 50, 51, 133, 136
McDougal *v.* Armstrong 570
v. Dougherty 336
McDowall *v.* Peyton 199
McDowell *v.* Goldsmith 203
McElfresh *v.* Schley 297, 299, 303
McElhenny *v.* Hubert Oil Co. 239
McElhenny's Appeal 144, 239
McElrath *v.* The Pittsburgh, etc., R. R. Co. 47
McFadden *v.* Jenkyns 64
v. Robinson 207
McFerran *v.* Taylor 191, 198
McGarvey *v.* Hall 368
McGee *v.* McGee 113
McGibbeny *v.* Burmaster 385
McGinity *v.* McGinity 9, 83, 155
McGinis *v.* McGinis 303
McGirr *v.* Aaron 129
McGoon *v.* Shirk 42
McGough *v.* Ins. Bank 37
McGowan *v.* McGowan 81
v. West 387
McGowen *v.* Remington 37, 368
McGuire *v.* McGowen 83
v. Ramsay 80
v. Smock 228
McHan *v.* Ordway 93
McHenry *v.* Hazard 417
McHugh *v.* County of Schuylkill 202
McIlvaine *v.* Gethen 227
v. Smith 61
McIntier *v.* Shaw 154
McIntire *v.* Hughes 69, 373
v. Zanesville 142
McIntyre *v.* Miller 329
v. Story 424, 437, 465
McKay *v.* Carrington 394
v. Green 529
McKechnie *v.* Sterling 364
v. Hoskins 268
McKee *v.* Judd 166
v. McKinley 55, 106
v. Philips 385
McKelvey *v.* Truby 288
McKenna *v.* George 328, 329
McKennan *v.* Phillips 99, 114
McKim *v.* White Hall Co. 181
McKinney *v.* Hensley 231
v. Rhoads 68
McKinzie *v.* Perrill 268
McKnight *v.* Brady 353
v. Robbins 370
McKnight's Executors *v.* Walsh 142
McLain *v.* School Directors 131
McLarren *v.* Brewer 86
McLaughlin *v.* McLaughlin 43
McLauren *v.* Wilson 293
McLaurie *v.* Barnes 376
v. Thomas 353
McLellan *v.* Walker 167
McLoud *v.* Roberts 346
McMahan *v.* Kimball 500
McMillan *v.* Arthur 238
v. Richards 151
McMorris *v.* Crawford 365
McMullen *v.* Beatty 103
v. Vanzant 370
McMurray *v.* St. Louis Company 187
McMurtrie *v.* Bennet 377
McNab *v.* Young 55
McNair *v.* Lot 151
McNairy *v.* Eastland 527
McNees *v.* Swaney 153
McNeil *v.* Tenth Nat. Bank 168
McNeile *v.* McNeile 335
McNeill *v.* Bradley 570
v. Reid 505
McNew *v.* Toby 37
McNutt *v.* Strayhorn 521
McPherson *v.* Watt 236
McQueen *v.* McQueen 297
McRee's Adm'r. *v.* Means 72, 73
McWilliams *v.* Webb 169
Mead *v.* Bunn 207, 215
v. Penna. Co. 61
v. West Chester Fire Ins. Co. 191
Meader *v.* Norton 203
Meadow Valley *v.* Dodds 460
Meason *v.* Kaine 377
Mechanics' Bank *v.* Seton 368
Meckley's Estate 187
Meech *v.* Allen 518
Meehan *v.* Forrester 151
v. Williams 268
Meek *v.* Kettlewell 67
v. Perry 234
Meeting St. Baptist Soc. *v.* Hail 130
Megarge *v.* Naglee 55
Meigs *v.* Dimock 356
Meily *v.* Wood 511
Melchor *v.* Burger 297
Mellish *v.* Mellish 196
v. Robertson 187
Mellon *v.* Mulvey 247
Melvin *v.* Lisealy 424
Menagh *v.* Whitwell 522
Mendes *v.* Guedella 146
Menges *v.* Oyster 187
Merced *v.* Fremont 435, 436
Mercer *v.* Newcum 143
v. Stark 65
Merchants' Nat. Bank *v.* Paine 527
Meredith *v.* Henneage 75
Meriwether's Adm'r *v.* Herran 166

Merriam *v.* Hassam 62
v. The Boston R. R. Co. 293
Merrill *v.* Houghton 359
v. Humphrey 43
Merriman *v.* Russell 503
Merritt *v.* Brown 392
v. Lambert 236
Messeck *v.* The Supervisors 424
Messersmith *v.* Sharon Sav. Bank 527
Metcalf *v.* Cook 103
Metcalfe *v.* Archbishop of N. Y. 165
Metcalfe's Trusts, In re 237
Methodist Episcopal Church *v.* Jaques 86, 527, 560
Methodist Episcopal Church *v.* Remington 117, 122
Methodist Episcopal Church *v.* Wood 86
Metler *v.* Metler 407, 459, 473
Metropolitan Bank *v.* Godfrey 188
v. Taylor 100, 103
Metzgar *v.* Metzgar 171
Mevey's Appeal 333
Meyer *v.* Yesser 42
Michener *v.* Cavender 230
Michigan State Bank *v.* Hammond 181
Michoud *v.* Girod 94, 143, 203, 260
Micklethwait *v.* Micklethwait 434
Middleton *v.* Greenwood 477
Midland Great Western R. R. Co. of Ireland, In re 187
Mildred *v.* Austin 151
Miles *v.* Ervine 236
v. Lefi 283
v. Lingerman 293
v. Stevens 376
v. Wheeler 94
Milford *v.* Reynolds 136
Milhau *v.* Sharp 465
Milkman *v.* Ordway 47
Mill *v.* Hill 92
Millar *v.* Taylor 449, 454
Millard *v.* McGee 242
Millard's Case 52
Miller *v.* Atkinson 121
v. Ball 385
v. Brown 103
v. Chetwood 382
v. Chittenden 130
v. Commonwealth 310
v. Cook 221
v. Davidson 527
v. Edwards 86
v. Gorman 424
v. Grandy 417
v. Harwell 346
v. Henderson 258
v. Henlan 376
v. Jones 509, 510
Miller *v.* Kent 484
v. Lincoln 157
v. McCan 409
v. Meetch 77
v. Newton 103
v. Porter 121, 122
v. Sherry 47, 274, 527
v. Simonds 235
v. Springer 303
v. Stokely 83
v. Thatcher 63
v. Williamson 103
Miller and Bowman's Appeal 310
Miller's Appeal 288
Miller's Ex'rs *v.* Commonwealth 121
Millett *v.* Davey 433
Millican *v.* Millican 235
Milligan's Appeal 86, 333
Milligar *v.* Sorg 288
Milliken *v.* Dravo 385
v. Ham 81
Millikin *v.* Bailey 157
Mills *v.* Farmer 119, 128
v. Haywood 385
v. Hoffman 294
v. Hyde 328
v. Lockwood 190
v. Miller 187
Millsapps *v.* Pfeiffer 37
Milroy *v.* Lord 66, 67, 168
Miltenberger *v.* Logansport Rd. 344
Milton *v.* Hogue 37
Milwaukee *v.* Koeffler 424
Milwaukee & M. Rd. *v.* M. & W. Rd. 166
Milwaukee R. R. Co. *v.* Soutter 577
Mims *v.* Macon and Western R. R. Co. 353, 355
Miner *v.* Miner 546
Minet *v.* Morgan 563
Minini *v.* Cox 142
Minnig's Appeal 436
Minor *v.* Ferris 539
Minors *v.* Batteson 77
Minot *v.* Mitchell 80
Minshaw *v.* Jordan 473
Minturn *v.* Baylis 377
v. The Farmers' Loan and Trust Co. 409
v. Seymour 66
Miskey's Appeal 67, 235
Mississippi & Mo. Rd. *v.* Ward 443
Mississippi, State of, *v.* Johnson 424
Mitchell *v.* Bunch 47, 366
v. Hayne 421
v. Homfray 231, 237
v. Jones 219
v. Manufacturing Co. 484
v. McDougall 213
v. Otey 37

Mitchell *v.* Reynolds 124, 228
v. Winslow 165
Mitchell's Case 287
Mizner *v.* Kussell 205
Moale *v.* Buchanan 382, 485
Moffit *v.* Adams 284
v. McDonald 86
Mogg *v.* Hodges 350
Moggridge *v.* Thackwell 126, 128, 129
Mohawk Bridge Co. *v.* Utica, etc., R. R. Co. 440
Molton *v.* Martin 103
Monell *v.* Monell 146
Money *v.* Ricketts 268
Monks *v.* Belden 291
Monnin *v.* Beroujou 190
Monroe *v.* Smith 245
Montacute *v.* Maxwell 386
Montague, Ex parte 167
Montagu (Lord) *v.* Dudham 559
Montefiore *v.* Brown 260
Montgomery *v.* Chadwick 151, 137
v. Milliken 310
Moody *v.* Wright 165
Mooers *v.* White 486
Mooney *v.* Miller 207
Moore *v.* Appleton 332
v. Atlanta 402
v. Beason 151
v. Brecken 93
v. Brown 407
v. Burrows 365
v. Cord 575
v. Crofton 69, 373
v. Hamilton 141
v. Harrisburg Bank 160
v. Helcombe 171
v. Isley 330
v. Jaeger 47
v. Lyttle 37
v. Moore 83, 113, 230, 328, 355
v. Munn 258
v. Small 385
v. Titman 157
v. Wade 154, 155
v. Young 331
Moorer *v.* Kopmann 370
Moores *v.* Smedley 424
More *v.* Cleghorn 65
v. Freeman 114
Morehead *v.* Eads 207
Morehouse *v.* Cotheal 432
Moreland *v.* Atchison 188, 312
Morenhout *v.* Higuera 489
Moreton *v.* Harrison 354
Morey *v.* Grant 578
v. Hetrick 81
Morgan *v.* Bank of N. America 164
v. Boone 93
Morgan *v.* Malleson 67
v. Minott 236
v. Morgan 60
v. Shinn 155, 470
v. Skidmore 515
v. Smith 417
Moriarty *v.* Martin 300
Morice *v.* The Bishop of Durham 75, 87, 124, 131
Morison *v.* Moat 427
Morley *v.* Rennoldson 225, 226
v. White 424
Mornington (Countess of) *v.* Keene 165
Moroney's Appeal 159
Morrell *v.* Cowan 97
Morret *v.* Parke 159
Morrill *v.* Noyes 165, 358
Morris *v.* Colman 238
v. Kearsley 507
v. Lewis 373
v. McCoy 179
v. McCullough 166
v. Morris 138
v. Penrose 191
v. Zeigler 247, 276
Morris Canal Co. *v.* Emmett 216
Morris Run Coal Co. *v.* Barclay Coal Co. 228
Morriso *v.* Philliber 219
Morrison *v.* Beirer 67
v. Hershire 43
v. Kelly 273
v. McLeod 230
Morrow *v.* Brenizer 307, 312, 315, 318
Morse *v.* Martin 193
v. Morse 228
v. Stevens 419
Morss *v.* Elmendorff 390
Mortimer *v.* Bell 209
v. Capper 191
v. Crosbie 470
Mortlock *v.* Buller 376, 380
Morton *v.* Barrett 55
v. Naylor 167
Mosby *v.* Wall 382
Mosely *v.* Boush 172
v. Gainer 243
Moser *v.* Libenguth 471
Moses *v.* Murgatrouyd 86, 337
v. Ranlet 341
Moss *v.* Hansom 380
Mott *v.* Clark 170, 171, 265
v. Harrington 236
Motte *v.* Bennett 449
Mounce *v.* Byars 356, 357
Mount *v.* Potts 333, 341
Mountfut, Ex parte 546
Mount Holly Co. *v.* Ferree 168, 419
Mount Zion *v.* Gillman 418

Movan *v.* Hays 64
Mower *v.* Kip 518
v. Orr 312
Mowry's Appeal 283
Mowry *v.* City of Providence 123
v. Todd 167
Moyer's Appeal 383
Moyle Finch's Case 52
Moyle *v.* Moyle 139
Mozier's Appeal 335, 337
Mucklow *v.* Fuller 146
Muldrow *v.* Muldrow 365
Mulkern *v.* Ward 465
Mullen *v.* Wilson 247
Muller *v.* Dows 47
Mulliken *v.* Graham 268
Mullings *v.* Trinder 378, 379
Mullison's Estate 171
Mulvany *v.* Kennedy 436
Mumford *v.* Am. Life Ins. Co. 43
Muncey *v.* Jouet 284
Mundorf *v.* Wickersham 218
Mundy *v.* Mundy 498, 501
Munsell *v.* Loree 377
Munson *v.* Hallowell 203
v. Munson 576
Murdoch *v.* Finney 169
Murdock's Case 433
Murphy *v.* Hubert 63, 83
v. Nathans 84
Murray *v.* Ballow 267, 274
v. Barlee 102
v. Dake 258
v. Jones 292
v. Lord Elibank 110
v. Lylburn 171, 274
v. Murray 516
Murrell *v.* Goodyear 380
Murrill *v.* Neill 515, 518
Muskingum (Bank of) *v.* Carpenter 357
Musselman *v.* Kent 42
v. Marquis 435, 436
Musser *v.* Oliver 291
Mutlow *v.* Bigg 323
Myers *v.* Myers 83

N.

Nab *v.* Nab 64
Nabob of Arcot *v.* East India Co. 47
Nase *v.* Boyer 430
Nagle *v.* Newton 395, 478
Naglee *v.* Ingersoll 309
Naglee's Appeal 55, 317
Naglee's Estate 77
Nairn *v.* Prowse 366
Naldred *v.* Gilham 67
Nance *v.* Nance 141
Nantes *v.* Corrack 102
Napier *v.* Darlington 364
Nass *v.* Vanswearingen 283
Natal Investment Co., In re 170
Natbrown *v.* Thornton 37
National Bank *v.* Sprague 518
Nazro *v.* Merchants' Ins. Co. 465
Neal's Appeal 106
Neal *v.* Gregory 385
Neblett *v.* McFarland 198
Needles *v.* Martin 130
v. Needles 120, 162
Neely's Appeal 203
Neemyer *v.* L. R. Junc. Ry. 465
Neff's Appeal 146, 341
Neff *v.* Miller 337
Negley *v.* Lindsay 202
Negroes Chase et al. *v.* Plummer 74
Neil *v.* Cummings 207
Neilson *v.* Fry 336
v. McDonald 198, 230
Neimcewicz *v.* Gahn 331
Nelson *v.* Allen 484
v. Hagerstown Bank 395
v. Harwood 367
v. Pinegar 433
v. Stocker 293
N. R. Construction Co., Re 337
Nesbit *v.* Brown 179
v. Moore 365
v. Smith 331
v. St. Patrick's Church 483
Nesmith *v.* Drum 167
Netthorp *v.* Holgate 390
Neve *v.* Pennell 272
Neves *v.* Scott 13, 57, 58, 114
Nevill *v.* Snelling 220
Nevins *v.* Dunlap 191
New *v.* Bonaker 53, 131, 136
Newark Plank Road Co. *v.* Elmer 465
Newberry *v.* James 427
Newbery, In re 548
Newbold *v.* Newbold 151
New Boston Mining Co. *v.* Pottsville 439
New Brunswick Railway Co. *v.* Conybeare 218
New Brunswick, &c., R. R. Co. *v.* Muggeridge 208
Newby *v.* Hill 167
v. Skinner 316
Newcomb *v.* Bonham 153
Newcomer *v.* Kline 190
Newells *v.* Morgan 80
v. Nixon 284
New England Bank *v.* Lewis 68
Newham *v.* May 200
New Hampshire Bank *v.* Willard 159
New Home Sewing Machine Co. *v.* Fletcher 424
Newlin *v.* Freeman 103

New London *v.* Brainerd 424
Newman *v.* Alvord 457
v. Chapman 247
v. James 100
v. Payne 206
v. Rogers 393
v. Willetts 526, 527
New Market *v.* Smart 147
New Parish *v.* Odiorne 55
New Sombrero Phosphate Co. *v.* Eslanger 239
Newsome *v.* Bowyer 113
Newton *v.* Bronson 366
v. Fay 470
v. Marsdon 327
v. Swazey 365, 385
New York Guarantee Co. *v.* Memphis Water Co. 172
New York & New Haven R. R. Co. *v.* Schuyler 168, 208
New York, Ont. & W. Rd. *v.* Davenport 575
New York Steamboat Co. *v.* New Jersey Steamboat Co. 341
New Zealand Banking Co., In re 351
Nice's Appeal 55, 272
Nicholas *v.* Thornton 80
Nichols *v.* Cabe 155
v. Danvers 113
v. Eaton 61
v. Levy 61
v. Williams 377
Nicholson *v.* Knowles 420
Nickall *v.* Miller 104
Nicoll, In re 550
Nicoll *v.* Mumford 68
v. The Trust es 418
Nightengale *v.* Goulburn 136
v. Hidden 100
Nimmo *v.* Davis 220
Nivin *v.* Belknap 284
Nix *v.* Bradley 103, 104
Nixon *v.* Rhodes 100
v. Rose 104
Nixon's Appeal 82, 83
Noble *v.* Mors 235
Noetling *v.* Wright 207
Nokes *v.* Gibbon 181
Noonan *v.* Lee 13
Norcross *v.* Widgery 273
Norcum *v.* D'Æneh 193
Norcutt *v.* Dodd 246
Norfold Trust Co. *v.* Marye 400
Norfolk's Case, Duke of 133
Norman *v.* Burnett 65
Norris's Appeal 143, 503
Norris *v.* Clark 298
v. Johnston 61
v. Tayloe 232, 239
Norris *v.* Wilkinson 357
North *v.* The Earl of Strafford 504
v. Turner 166
v. Valk 315
North American Coal Co. *v.* Dyett 410
North Baltimore Building Association *v.* Caldwell 239
North Eastern Ry. Co. *v.* Martin 484
Northern Co. Ins. Co. *v.* Whipp 358
North Georgia Min. Co. *v.* Latimer 370
North Penna. Coal Co. *v.* Snowden 37
Norton *v.* Coons 329
v. Leonard 55
v. Soule 336
v. Webb 152
v. Woods 409
Norwich *v.* Hubbard 152
Norwich Yarn Co.'s Case 331
Norwood *v.* Norwood 336, 492
Nottidge *v.* Prince 230
Nourse *v.* Prime 486
Novello *v.* Sudlow 452
Noyes *v.* Clark 180
Nunda *v.* Crystal Lake 424
Nuneaton Local Board *v.* General Sewage Co. 463
Nunn *v.* Fabian 385
Nutt *v.* Mutt 297
Nyce's Estate 141

O.

Oakeley *v.* Pashellar 337
Oakes *v.* Turquand 202, 472
Oakley *v.* Hurlbut 37
Obert *v.* Obert 143, 489, 492
Ochiltree *v.* Wright 146
Ochsenbein *v.* Papelier 407
O'Connor *v.* Spaight 484
Odell *v.* Odell 133
Odenbaugh *v.* Bradford 155, 470
Odle *v.* Odle 37
Oelrichs *v.* Spain 13, 37, 200
Ogden's Appeal 55, 106
Ogden *v.* Astor 485, 486
v. Larrabee 143, 239
Ogilvie *v.* Jeaffreson 202
O'Hara *v.* Dilworth 80
v. Stack 465
Ohio Insurance Co. *v.* Ledyard 272
v. Ross 273
Ohling *v.* Luityens 37
Oil Creek R. R. *v.* Atlantic and Great Western R. R. 181, 371
Old Colony *v.* Evans 364
Oldham *v.* Hughes 314, 324
Oldhams *v.* Jones 487
Old South Society *v.* Crocker 116
Olive *v.* Dougherty 83, 385

Olivera *v.* University 37
Oliver *v.* Brickland 537
v. Crosswell 478
v. Piatt 86
O'Mulcahy *v.* Holly 291
Olmsted's Appeal 409
Olmsted *v.* Olmsted 471
O'Neill *v.* Capelle 155
Onslow *v.* Wallis 60
Ontario Bank *v.* Mumford 172
v. Root 64
Opdyke *v.* Bartles 151
Oregon Steam Nav. Co. *v.* Winsor 228
O'Reilly *v.* Nicholson 295
Oriental Commercial Bank (Case of) 331
Ormes *v.* Beadel 259
O'Rorke *v.* Boblingbroke 220
Orphan Asylum *v.* McCartee 577
Orr *v.* Draper 558
v. Zimmerman 181
Orrell *v.* Orrell 297, 299
Ortman *v.* Plummer 353
Orton *v.* Smith 575
Osburn *v.* Bank United States 455, 459
v. Carr 264
v. Elder 282
v. Heyer 578
v. Morgan 112
v. Noble 337
v. Phelps 382, 470
Osburne *v.* Barter 439
Osgood *v.* Franklin 219, 374
Osmond *v.* Fitzroy 230
Osterman *v.* Baldwin 63
Oswald *v.* McGehee 214
Otis *v.* Beckwith 66, 67
Otley *v.* McAlpine's Heirs 487
Ottenhouse *v.* Burleson 385
Overman's Appeal 61
Overseers *v.* Tayloe 120
Overton *v.* Banister 293
Owen *v.* Homan 577
v. Pall 177
Owens *v.* Childs 425
v. Crossett 435
v. Dickinson 102
v. Miller 272
Owings *v.* Baldwin 378
v. Myers 274
Ownes *v.* Ownes 66
Oxford *v.* Tyrell 8
Oxford and Cambridge (Universities of) *v.* Richardson 449
Oxford's (Earl of) Case 10, 407, 411
Ozley *v.* Ikelheimer 103

P.

Packard *v.* Putnam 64
Packer *v.* Rochester, etc., R. R. Co. 151
Paddock *v.* Fletcher 208
v. Strowbridge 213
Page *v.* Allen 424
v. Estes 110, 113
v. Greeley 378
v. Heath 527
v. Page 80, 83, 84
v. Van Kirk 509, 510
Paine *v.* Lake Erie, etc., R. R. Co. 42
Paisley's Appeal 72
Pallan *v.* Air Line R. R. Co. 165
Pallen *v.* Agricultural Bank 333
Pallis *v.* Robinson 527
Palmer *v.* De Witt 455
v. Ford 181
v. Harris 456
v. Richardson 385
v. Simmonds 76
v. Williams 267
Palmes *v.* Danby 151
Panama, &c., Royal Mail Co., In re 358
Parham *v.* Green 335
Paris Skating Rink Co., In re 166
Park *v.* Johnson 219
Parke *v.* Leewright 385
Parker's Appeal 55
Parker *v.* Brancker 358
v. Brooke 99, 100
v. Coburn 538
v. Crittenden 294
v. Culvertson 338
v. Frith 393
v. Garrison 459
v. Gerard 487, 489
v. Hayes 215
v. Kelly 356
v. Sears 449
v. Stevens 575
v. Wells 385
v. Whyte 463
v. Winnipiseogee Co. 439
Parkes *v.* White 104, 227
Parkhurst *v.* Hosford 230
v. Kinsman 448
v. Van Cortlandt 385, 390
448
Parkinson's Appeal 307
Parkist *v.* Alexander 92, 93, 159, 271
Parkman *v.* Welch 333, 341
Parks *v.* Jackson 274
Parmlee *v.* Sloan 83
Parnall *v.* Parnall 72
Parrett *v.* Shaubhut 271
Parrish *v.* Koons 377
Parshall's Appeal 94, 143, 237

Parson's Administrator *v.* Wilson 177
Parsons *v.* Baker 73
v. Hoyt 274
v. Hughes 433
v. Parsons 110, 113
Partridge *v.* Haven 84
Paschal *v.* Acklin 121, 130
v. Henderer 203
Pasley *v.* Freeman 198
Passyunk Building Association's Appeal 483
Patch *v.* Ward 198
Patchin *v.* Lamborn 393
Patterson *v.* Barlow 424
v. Boehm 248
v. Fish 425
v. Kirkland 213
v. Lane 37
v. Patterson 113
Patterson, etc., R. R. Co. *v.* Jersey City 417, 418
Patten *v.* Moore 267, 268
v. Wilson 167
Patterson *v.* Lytle 282, 291
v. McCamant 418
v. Yeaton 385
Patton *v.* Campbell 177
v. McClure 385
v. The Borough 273
Paul *v.* Chouteau 80
v. Fulton 267
v. Paul 66
v. Squibb 288
Paulison *v.* Van Iderstine 191
Paxton *v.* Harrier 333, 341
Payne *v.* Bullard 37
v. Graves 478
v. Sheldon 527
v. Patterson 154
Peabody *v.* Flint 465
v. Norfolk 427
v. Tarbell 81, 83, 395
Peachy *v.* Duke of Somerset 178, 179
Peacock *v.* Peacock 509
Peak *v.* Dorwin 227
v. Hayden 460
Peake *v.* Highfield 474
v. La Baw 103
Pearce *v.* Creswick 565
v. Morris 151
v. Roberts 167
v. Watts 377
Pearpoint *v.* Graham 509
Pearse, Ex parte 357
v. Greene 148
Pearsoll *v.* Chapin 202
Pearson *v.* Cardon 421
v. Darrington 37
v. Jameson 145
Pearson *v.* Morgan 198
v. Seay 154
v. Williams 180
Pearson's Case 239
Pease *v.* Kelly 353
v. Pilot Knob Iron Co. 151
Peck *v.* Bullard 203
v. Ellis 328, 332
Peckham *v.* Balch 385
v. Barker 385
Peek *v.* Gurney 208
Peers *v.* Lambert 389
Peery *v.* Hall 287
Peiffer *v.* Lytle 84
Pell *v.* Ball 489
v. Mercer 118
Pelletreau *v.* Jackson 162
Pellman *v.* Hart 168
Peltier *v.* Peltier 113
Pember *v.* Inhabitants of Kingston 122
Pemberton *v.* Pemberton 295, 298
Pendleton *v.* Dalton 371
Penn Bank *v.* Hopkins 527
Penn *v.* Lord Baltimore 47, 52, 366
v. Whitehead 103
Penna. Co. *v.* Delaware, etc., Co. 375
Pennell *v.* Deffell 86
Pennington *v.* The Governor 177
Pennock's Appeal 209
Estate 72, 76
Pennock *v.* Coe 165
Pennsylvania Bank *v.* Potius 330
Insurance Co. *v.* Foster 103
Lead Co.'s Appeal 439
Salt Co. *v.* Neel 99, 247
(State of) *v.* Wheeling Bridge Co. 443
Penny *v.* Allen 52
v. Avison 142
v. Martin 175, 191
v. Turner 77
v. Watts 269
Peoples' Bank's Appeal 206
People (The) *v.* Brown 281, 282
v. Elmore 168
v. Houghtaling 37
v. Mercein 546
v. New York 465
v. Stock Brokers' Building Co. 378
v. Supreme Court of New York 180
v. Tioga 160
Pepper *v.* Lee 100
Pepper's Will 194
Percival *v.* Harger 216
v. Phipps 455

Perin *v.* Carey 117, 124, 130, 133
Perkins *v.* Elliott 102, 103
v. Gay 191
v. Hays 104
v. Lyman 180
Perot's Appeal 310
Perry *v.* Boileau 100
v. Craig 203
v. Dicken 236
v. Head 80
v. Parker 405
v. Pratt 502
v. Truefit 456, 457
Perry Herrick *v.* Attwood 250
Peter *v.* Beverley 146, 307
v. Wright 202
Peters *v.* Deleplaine 376
v. Florence 187
v. Jones 281
v. Mortimer 222
v. Prevost 417
Peterson *v.* Clark 154
Peto *v.* Hammond 269
Petre *v.* Espinasse 67
Pettibone *v.* Hamilton 400
Petty *v.* Petty 255, 499
Peverell *v.* Huse 8, 402
Peyton *v.* Hallett 164
Pharis *v.* Leachman 529
Phelps *v.* Ellswood 158
v. Green 492
v. Harris 575
v. Pond 312
Phelps *v.* Seely 83
v. Wait 208
Philadelphia *v.* Fox 116, 136
Philadelphia (City of) *v.* Davis 209, 303
v. Girard's Heirs 128, 130, 133
Philadelphia and Erie R. R. Co. *v.* Catawissa R. R. Co. 465
Philadelphia, etc., R. R. Co. *v.* Woelpper 165, 358
Philadelphia Trust Co.'s Appeal 55
Philadelphia Trust Co. *v.* The Fame Ins. Co. 331
Philbrook *v.* Delano 90, 353
Phillips's Appeal 55
Phillips *v.* Atkinson 514
v. Belden 203, 486
v. Berger 368
v. Boardman 435
v. Brydges 52
v. Crammond 83, 86
v. Hassell 113
v. Hudson 317
v. Medbury 227
Phillips *v.* Meily 9
v. Moore 230
v. Mullings 67
v. Phillips 43, 45, 171, 264, 501
v. Prevost 39
v. Saunderson 355
v. Sinclair 151
v. Stagg 167
v. Thompson 337, 385, 390, 395, 478
v. Winslow 165
Philpott *v.* Elliott 382
Phœnix *v.* Gardiner 154
Phœnix Iron Co. *v.* Philadelphia 167
Phyfe *v.* Wardell 375
Piatt *v.* Oliver 86
Picard *v.* Hine 102
v. McCormick 207
Pickard *v.* Sears 284, 287
Pickering *v.* Bishop of Ely 464
v. Ilfracombe Railway 168
v. Pickering 371
v. Shotwell 121, 122, 136
v. Tongue 8
Pickersgill *v.* Lahens 471
Pidding *v.* How 456
Pierce *v.* Emory 165
v. McKeehan 65, 86
Pierce *v.* Milwaukee and St. Paul R. R. Co. 165, 356
v. Pierce 81
v. Robinson 153, 154
v. Trigg 512
Pierson *v.* Catlin 336
v. David 353
v. Garnet 73
v. Neill 376
Piggott *v.* Stratton 211
Pigot *v.* Curbey 359
Pike *v.* Armstead 272
v. Dickinson 482
v. Fay 207
v. Fitzgibbon 102
v. Gleason 160
Pilcher *v.* Rawlins 275, 276, 501
Pillsworth *v.* Hopton 460
Pinchain *v.* Collard 355
Pinckard *v.* Pinckard 66
Pinckney *v.* Pinckney 346
Pingree *v.* Comstock 68
Pinkerton *v.* The Railroad 168
Pinkham *v.* Gear 189
Pinner *v.* Sharp 376, 377
Pinney *v.* Fellows 80, 83, 86
Piper *v.* Piper 436
v. Smith 512
Piscataqua Ins. Co. *v.* Hill 200
Pit *v.* Cholmondeley 486

Pitcher *v.* Barrows 271
v. Henessey 258
Pitts *v.* Cable 154
Pittsburgh's Appeal 424
Pittsburgh and Connellsville Rd. Co.'s Appeal 37
Plank Road Company *v.* Murray 180
Platt *v.* Square 151
Pleasonton *v.* Raughley 385
Plumer *v.* Guthrie 155
v. Reed 96
Plummer *v.* Farmers' Bank 283
Poague *v.* Boyce 243
Poindexter *v.* Jeffries 110
Polhill *v.* Walter 214
Polk *v.* Rose 575
Pollard *v.* Shaffer 2
Pollock *v.* Maison 151
Pomeroy *v.* Wells 113
Pond *v.* Carpenter 103
Poole's Case 228
Poole *v.* Middleton 368
v. Munday 141
Pooley *v.* Budd 368
v. Quilter 143
Poor *v.* Hazelton 220
Pope *v.* Chaffee 223
v. Curl 455
Pope's Ex'rs *v.* Elliott 61
Popham *v.* Exham 239
Portarlington (Lord) *v.* Soulby 412, 424
Porter *v.* Bank of Rutland 65
v. Cole 272
v. Dolby 57
v. Fall 412
v. Patterson 485
v. Spencer 581
v. Turner 194
Portland (Duke of) *v.* Topham 256
Port Royal R. R. Co. *v.* Hammond 47, 366
Post *v.* Kimberley 484
Poston *v.* Eubank 333
Potter *v.* Fuller 449
v. Gracie 198
v. Hicks 515
v. Muller 449
v. Thorton 120, 133
v. Titcomb 204
v. Waller 489
Poughkeepsie Gas Co. *v.* Citizens' Gas Co. 435
Powell *v.* Elliot 390
v. Evans 139
v. Powell 80
v. Murray 103
v. Williams 157
Powell Duffryn Steam Coal Co. *v.* Taff Vale Railway Co. 400
Power *v.* Reeder 482
Power's Appeal 220
Powers *v.* Hale 374
v. Mayo 219
Powles *v.* Hargreaves 351
Powys *v.* Blagrave 432
Prater *v.* Miller 377
Prather *v.* Prather 113
Pratt *v.* Ayer 64
v. Barker 230
v. Brett 464
v. Carter 242
v. Eby 378
v. Law 478
v. Longworth 37
v. Northern 529
v. Philbrook 215
v. Taliaferro 307, 310
Pray's Appeal 130
Preachers' Aid Society *v.* Rich 139
Preddy *v.* Rose 166
Presbyterian Cong. *v.* Johnston 52
President of United States *v.* Drummond 121
Preston *v.* Stuart 377
Prettyman *v.* Wilkey 268
Prevost *v.* Clarke 73
v. Gratz 143
Price's Appeal 39
Price *v.* Maxwell 121, 124
v. McDonald 273
v. Minot 571
v. Perrie 153
v. Reeves 80
v. Sisson 55, 57, 60
v. Taylor 55
Prickett *v.* Seibert 333
Pride *v.* Boyce 331
v. Bubb 101
Prideaux *v.* Lonsdale 231, 254
Prince Albert *v.* Strange 454
Prince *v.* Heylin 38
Pringle *v.* Dorsey 130
v. Dunkley 227
v. Pringle 66
Printup *v.* Mitchell 385
Prioleau *v.* United States 52, 564
Pritchard *v.* Elton 153
v. Ovey 377
v. Wallace 86
Probasco *v.* Johnson 357
Proby *v.* Landor 72
Proctor *v.* Ferebee 47
v. Putnam Machine Co. 288
v. Spatley 214
Professional Life Assurance Co.'s Case 342

Proof *v.* Hines 198
Proseus *v.* McIntyre 82, 84
Prosser *v.* Edmunds 166
Prothero *v.* Phelps 412
Proudfoot *v.* Wightman 376
Provost of Dumfries *v.* Abercrombie 130
Prudential Assurance Company *v.* Thomas 424
Prudential Ins. Co. *v.* Knott 465
Pruner *v.* Pendleton 441
Pryce *v.* Bury 357
Public Works *v.* Columbia College 527
Pugh *v.* Currie 86
v. Good 385
v. Pugh 86
Pulliam *v.* Newberry 243
Pullman Car Co. *v.* Tex. & Pac. Ry. Co. 377
Pullman *v.* Upton 239
Pulsford *v.* Richards 214, 216
Pulteney *v.* Darlington 325
v. Shelton 463
Pumfrey, In re 86
Purcell *v.* Miner 385
v. Purcell 113
Purdy *v.* Purdy 81, 82
Purvis *v.* Brown 151
Pusey *v.* Desbouverie 188
v. Pusey 368
Puterbaugh *v.* Elliot 190
Pye, Ex parte 66, 540
Pye *v.* Daubuz 367
Pyle's Appeal 310
Pym *v.* Bowremann 151
Pyrke *v.* Waddingham 378, 379

Q.

Queen (The) *v.* Shropshire Union 171
Quinn *v.* Roath 371

R.

Radcliffe's Executors *v.* Wightman 486
Rafferty *v.* King 151
Raggett *v.* Findlater 457
Ragsdale *v.* Hagy 170
Raikes *v.* Ward 65
Railroad Company *v.* Claghorn 338
v. Dubois 284, 291
v. Soutter 189
Rajah of Coorg *v.* East India Co. 564
Raley *v.* Williams 288
Ralls *v.* Hughes 501
Ramsay *v.* Bell 489
Ramsdell *v.* Butler 419
Ramsey's Appeal 164, 340, 341
Rand *v.* Cartright 151
Rand *v.* Webber 190, 198
Randall *v.* Bradley 151
v. Morrell 510, 578
v. Russell 93
v. Silverthorn 273
Randolph *v.* Kinney 417
v. Randolph 486
Ranelaugh *v.* Hayes 569
Rangeley *v.* Spring 293
Ranger *v.* Great Western Ry. Co. 484
Ranken *v.* Alfaro 351
v. Huskisson 400
v. Mortimore 153, 154, 187
Rapalee *v.* Stewart 289
Rardin *v.* Walpole 337
Rath *v.* Vanderlyn 260
Rathbone *v.* Warren 484
Rathbun *v.* Rathbun 90
Rau *v.* Van Zedlitz 230
Raval *v.* Russell 151
Rawden *v.* Shadwell 223
Rawlings *v.* Stewart 157
Ray *v.* Doughty 146
v. Simmons 66
Raybold *v.* Raybold 64
Raynor *v.* Timerson 288
Read *v.* Bailey 517
v. Long 372
v. Robinson 67, 68
v. Simons 357
Readdy *v.* Pendergast 236
Reade *v.* Conquest 452
v. Livingstone 244
Reader *v.* Speake 529
Reading (Corporation of) *v.* Lane 120
Rearich *v.* Swineheart 258
Reaves *v.* Garrett 295
Redfield *v.* Woodfold 572
Redford *v.* Gibson 356
Redgrave *v.* Hurd 214
Redman *v.* Green 486
Redmayne *v.* Forster 357
Redmond *v.* Dickerson 37
Reed *v.* Bachelder 332
v. Dickey 264
v. Gannon 269
v. Marshall 42
v. McCourt 288
v. Minell 203
v. Sidener 212
v. Tyler 43
v. Vannorsdale 66
Reed (Thomas) *v.* The Prior of Launceston 8
Reed's Appeal 276
Rees *v.* City of Watertown 37
v. Livingstone 61
v. Waters 110, 113
Reese *v.* Barrington 339

Reese *v.* Bradford 527
v. Ruth 66
v. Wyman 214
Reese River Mining Co. *v.* Smith 260, 472
Reeve *v.* Whitmore 165
Reeves *v.* Baker 72
Regina *v.* Cross 441
v. Pierce 441
Rehden *v.* Wesley 139
Reid *v.* Atkinson 72
v. Fitch 86
v. Flippen 207
v. Gifford 440
v. Gordon 53
v. Lamar 103
v. Middleton 578
v. Reid 64
Reid's Administrator *v.* Blackstone 72
Reigart *v.* White 338
Reilly *v.* Smith 377
Relf *v.* Eberly 198, 203
Remington *v.* Irwin 391
Remington Paper Co. *v.* O'Dougherty 474
Remsen *v.* Hay 153
Renison *v.* Ashley 37
Rennyson *v.* Rozell 371, 376
Republic of Costa Rica *v.* Erlanger 564
Republic of Peru *v.* Weguelin 564
Reservoir Co *v.* Chase 188
Resor *v.* Resor 86
Respass *v.* Breckenridge 492
Reves *v.* Toulman 181
Revett *v.* Harvey 232
Rex *v.* Akers 564
v. Arundel 177
v. Hare 6
v. Newman 121
Reynell *v.* Sprye 214, 562
Reynolds *v.* Crawfordsville Bank 571
Reynolds Ex parte 237
v. Godlee 316
v. Morris 81
v. Nelson 412, 414
v. Pitt 181
v. Tooker 342
Rhame *v.* Lewis 335
v. Rhame 167
Rhea *v.* Forsyth 440
Rhett *v.* Mason 72
Rhinehart *v.* Harrison 307
Rhode Island Hosp. Trust Co. *v.* Olney 118
Rhines *v.* Baird 264
Rhodes *v.* Arnsinck 530
v. Bate 231
Rhodes *v.* Dunbar 439, 440, 441
v. Farmer 258
Riccard *v.* Pritchard 167
Rice's Appeal 239, 337
Rice *v.* Burnett 55
v. Dewey 284
v. Downing 331
v. Gaulteer 581
v. Groffman 282
v. Hale 581
v. Morton 337
v. Rice 154, 171, 264, 356
v. Tonnele 578
Rich *v.* Cockell 101, 299
v. Whitfield 325
Richards *v.* Delbridge 67
v. Green 377, 385
v. Leaming 166, 357
v. Revitt 463
v. Salter 422
Richards's Appeal 37, 439, 440
Richardson *v.* Brooks 37
v. Inglesby 65
v. Linney 42, 234
v. Richardson 67
v. Ridgely 355
v. Rust 167
v. Wallis 157
Richmond *v.* Gray 378, 380, 394
v. Railroad Co. 375
Richter *v.* Selin 364
Rick's Appeal 67
Ricketts *v.* Montgomery 143
Riddle *v.* Emerson 64
Ridgeway *v.* Darwin 551
v. Newbold 501
Ridgway's Appeal 513
Ridgway *v.* Sneyd 191
Ridley *v.* McNairy 385
Ridout *v.* Lewis 108
Riegel *v.* Wood 198
Riesz's Appeal 377
Rife *v.* Geyer 55, 61
Rigby, Ex parte 145
Rigler *v.* Cloud 60
Rigsbee *v.* Trees 190
Ring *v.* Ashworth 184
Ringgold *v.* Byran 354
v. Ringgold 146
Riopelle *v.* Doellner 37
Ripley *v.* Harris 159
Ripple *v.* Ripple 268
Rippy *v.* Gant 230
Ritter's Appeal 66
Rittson *v.* Stordy 60
Rivard *v.* Gardiner 291
Rivers *v.* Durr 549
Rizer *v.* Perry 315
Roach *v.* Duckworth 409
v. Hudson 210
v. Trood 256

Roane *v.* Rives 100
Robb *v.* Mann 364
v. Shephard 283
Robbins *v.* Bates 239
Robert *v.* West 103
Robert's Appeal 64, 84
Roberts *v.* Anderson 405
v. Croft 357
v. Dixwell 60
v. Eberhardt 524
v. Fleming 268
v. McMahan 155
v. Moseley 55
v. Roberts 94
v. Rose 356
v. Taliafero 37
v. Taliaferro 190
v. Totten 486
v. Walker 349
v. Ware 80
Robertson *v.* Robertson 80, 385
Robeson *v.* Hornbaker 385, 387
Robey's Iron Works *v.* Ollier 351
Robey *v.* Hannon 67
Robinett's Appeal 142
Robinson *v.* Buck 9
v. Bullock 483
v. Bush 253
v. Campbell 13
v. Donnell 248, 165
v. Dart's Ex'rs 103
v. Farelly 153
v. Loomis 180
v. Lord Byron 400
v. Pett 143, 144
v. Robinson 80, 142, 324
v. Russell 433
v. The Governors 312, 317, 349
v. Urquhart 357
v. Wheeler 409
v. Willoughby 154
Robson *v.* Whittingham 439, 441
Rockafellow *v.* Newcomb 232
Rockwell *v.* Hobby 357
v. Lawrence 478
v. Morgan 501
Rockwood *v.* Rockwood 199
Rodick *v.* Gandell 167, 168
Rogan *v.* Walker 151, 153, 179
Rogers *v.* Dill 549
v. Erie 400
v. Evans 243
v. Higgins 103, 217, 230
v. Hosack 167
v. Ingham 187, 189
v. Jones 268, 272
v. Murray 82
v. Rathbun 222
Rogers *v.* Rogers 115
v. Saunders 370, 392
v. Smith 103
v. Ward 102, 103
v. Waterhouse 378
v. Williams 376
Rohrback *v.* Ins. Co. 102
Roland *v.* Miller 312
Rolling *v.* Hinks 465
Roney *v.* Moss 372
Roosevelt *v.* Thurman 196
Root *v.* Reynolds 243
Roscarrick *v.* Barton 151
Rose *v.* Jessup 309
v. Swann 376
v. Watson 356
Roshi's Appeal 465
Roskell *v.* Whitworth 441
Ross *v.* Butler 439
v. Gibbs 563
v. Union Pacific Rd. Co. 368, 377
Rotch *v.* Emerson 131
Roundell *v.* Currer 304
Rounds *v.* McCormick 527
Routh *v.* Webster 465
Row *v.* Dawson 164, 165, 167, 169, 170, 171
Rowan *v.* Sharp Manuf. Co. 158
Rowand *v.* Finney 258
Rowlands *v.* Evans 509
Rowley *v.* Rowley 257
Rowth *v.* Howell 139
Royall *v.* Garter 8, 402
Royer's Appeal 139
Rozier *v.* Griffith 492
Ruchman *v.* Astor 157
v. Decker 261
Rudd *v.* Matthews 283
Rudisell *v.* Watson 100
Rudolph *v.* Winters 223
Ruffin, Ex parte 515
Ruffler *v.* Woonack 154
Ruffles *v.* Alston 112
Ruffner *v.* Ridley 206
Rugge *v.* Ellis 389
Rumboll, Ex parte 423
Rumfelt *v.* Clemans 293
Rumford Market Case 92
Rumph *v.* Abercrombie 230
Runstetter *v.* Atkinson 370
Runyan *v.* Mersereau 151, 167
Rupert *v.* Mark 268
Russel *v.* Russel 357
Russell's Appeal 67
Russell *v.* Bomy 258
v. Church 190
v. Clark 200
v. Farley 478
v. Jackson 65, 86

Russell *v.* Miller 327
v. Mixer 190
v. Southard 153, 155, 170
v. The Church 190
v. Watt 353
Rush *v.* Lewis 55
Rutgers *v.* Kingland 265
Ruth *v.* Oberbrunner 85, 116
Rutherford *v.* Douglass 578
v. Jones 487
v. Tracey 288
Rutlege *v.* Greenwood 339
Ryall *v.* Rowles 162, 163, 166, 167, 168
Ryan *v.* Brown 435
v. Dox 210
v. Mockmath 473, 474
Ryder *v.* Bickerton 141
v. Emrick 260

S.

Sabele *v.* Sabele 500
Sabell *v.* Slingluff 529
Savin *v.* Bank of Woodstock 168
Sackville West *v.* Holmesdale 57
Safford *v.* Rantoul 64
Sailor *v.* Hertzog 268
Sale *v.* Moore 72
Salisbury (Earl of) *v.* Cecil 562
Salisbury, Matter of 549
Salmon *v.* Bennett 245
v. Claggett 433
v. Gibbs 257
Saltonstall *v.* Sanders 131
Salusbury *v.* Denton 77
Sammes *v.* L'Engle 167
Sample *v.* Coulston 89
Sampson *v.* Shaw 228
Samuel *v.* Wiley 581
Sanborn *v.* Kittredge 37
v. Sanborn 385
Sandeford *v.* Bewis 42
Sanders *v.* Beck 155
v. Logan 449
v. Rodway 115
v. Village of Yonkers 575
v. Wilson 157
Sandford *v.* Weeden 80, 83, 86
Sandoe's Appeal 305
Sanfoss *v.* Jones 80
Sanquirico *v.* Beneditti 462
Saratoga R. R. Co. *v.* Rowe 259
Sargeant *v.* Sargeant 170
Sarter *v.* Gordon 368
Satterthwait *v.* Marshall 370
Saunders's Case 432
Saunders *v.* Cramer 365
v. Edwards 57
Savage *v.* Jackson 215
v. Winchester 331
Savannah Nat. Bank *v.* Haskins 177
Savannah, &c. Rd. *v.* Shiels 439
Savery *v.* King 198, 220, 231
Sawer *v.* Gosser 465
v. Haag 527
Sawyer *v.* Hovey 191
v. Prickett 207
v. Upton 527
Saxby *v.* Laurence 8
v. Easterbrooke 465
Saxton *v.* Davis 527
Saylor *v.* Mockbie 510
Sayre *v.* Hughes 84
v. Townsends 81
Sayres *v.* Collyer 284, 463, 477
Says *v.* Barnes 234
Scales *v.* Ashbrooke 190
v. Maude 67
Scarlett *v.* Gorham 274
Scarsdale *v.* Curzon 57
Schafer *v.* Reilly 171
Schafroth *v.* Ambs 103
Scheetz's Appeal 435
Scheifflin *v.* Stewart 142
Scheile *v.* Brakell 455
Schenck *v.* Ellingwood 194
Schlaefer *v.* Corson 186
Schlecht's Appeal 578
Schmatz *v.* Avery 291
Schmitheimer *v.* Eiseman 198
Schmucker's Estate *v.* Reel 87
Schnell *v.* Chicago 293
Schnitzel's Appeal 330
Schnorr's Appeal 465
Scholefield *v.* Templar 188, 202, 217
School *v.* Dunkleberger 52
v. Kirwin 86, 139
Schoole *v.* Sall 413
Schotsmans *v.* Lancashire Rd. Co. 360
Schroder *v.* Schroder 299
Schroeppel *v.* Hopper 364
Schulenberg-Boeckler Lumber Co. *v.* Hayward 417
Schumm *v.* Seymour 424
Schunk's Appeal 341, 343
Schwarz *v.* Stein 356
Scofield *v.* Eighth, etc. 465
v. Lansing 575
Scott *v.* Beecher 425
v. Bilgerry 390
v. Frith 441
v. Gallagher 273
v. Henry 151
v. Indianapolis Wagon Works 242
v. Lord Hastings 168
v. Rayment 507
v. Tyler 224, 225, 226, 227
v. Umbarger 84

Scott's Administratrix *v.* Scott 37
Scoville *v.* Kennedy 491
Screven *v.* Joyner 328
Scroggins *v.* McDougald 268
Scruggs *v.* Blair 512
Scudamore *v.* Scudamore 314
Scudder *v.* Vanarsdale 307
Scully *v.* Rose 436
Seamen *v.* Cook 81, 86
Sears *v.* Laforce 335
v. Munson 268
v. Shafer 235
v. Smith 373
Sebring *v.* Mersereau 378, 489
Second Nat. Bank (Appeal of) 513
Second Nat. Bank of Titusville *v.* Caldwell 424
Secrest *v.* McKenna 43
Seechrist's Appeal 95, 218
Seeley *v.* Fisher 465
v. Jago 323, 324
Seibert *v.* Seibert 509, 510
Seixo *v.* Provezende 456, 457, 458
Selah *v.* Selah 230
Seldon's Appeal 65
Sellers *v.* Pennsylvania R. R. Co. 441
Sellors *v.* Board of Health 441
Sellman *v.* Bowen 501
Sells *v.* Sells 191
Senior *v.* Pritchard 558
Servis *v.* Nelson 56
Seton *v.* Slade 364, 389
Sewall *v.* Glidden 252
Sexton *v.* Wheaton 242, 243, 245, 247, 248, 251, 261, 521
Seylar *v.* Carson 210, 218, 220
Seymour *v.* Darrow 159
v. Delancy 219, 371, 380
v. Dock Company 484
v. Hazard 581
Shaeffer's Appeal 87
Shaeffer *v.* Chambers 157
v. Sleade 212
Shall *v.* Biscoe 353
Shamwald *v.* Lewis 527
Shankland's Appeal 55, 61
Shannon *v.* Bradstreet 194
Sharp *v.* St. Sauveur 60
v. Taylor 42, 248
Sharpless *v.* Welsh 65
Shartel's Appeal 189
Shattock *v.* Shattock 102
Shattuck *v.* Carson 575
Shaver *v.* Radley 203
Shaw *v.* Ball 231
v. Fisher 358
v. Foster 364
v. Neale 159
v. Spencer 284
Shaw *v.* Thackray 230
Shays *v.* Norton 155
Sheafe *v.* Sheafe 242
Shear *v.* Robinson 187
Shearer *v.* Shearer 512
Sheddon *v.* Goodrich 297, 299
Sheets's Estate 65
Sheffer *v.* Montgomery 86
Sheffield Water Works *v.* Yeomans 416
Shelburne *v.* Inchiquin 258
Shelby *v.* Perrin 355
v. Smith 184
Sheldon *v.* Centre, etc. 465
v. Harding 80
v. Sell 152
Shelley *v.* Shelley 57
v. Westbrooke 546
Shelly *v.* Brannan 449
v. Nash 220
Shelton *v.* Lewis 83
Shelton *v.* Shelton 66
Shenandoah Vall. Rd. Co. *v.* Lewis 371
Shepard *v.* Brown 481
Shepherd *v.* Adams 333
v. Bevin 219, 374
v. Churchill 490
v. McEvers 68, 135
v. Monts 142
v. Sanford 37
v. Shepherd 372
v. White 84
Shepman *v.* Ætna Ins. Co. 168
Sherk *v.* Endress 66
Sherman *v.* Dodge 55
v. Wright 371
Sherry *v.* Sansberry 234
Shew *v.* Bank of Pittsburgh 151
Shewel *v.* Dwarris 100
Shields *v.* Lozear 150
Shipley *v.* Ritter 436
Shipman *v.* Furness 232
Ship Warre, In re 165
Shirley *v.* Shirley 99, 106
Shirras *v.* Craig 159
Shitz *v.* Dieffenbach 357
Shoemaker *v.* Commissioners 136
v. Smith 81
v. Van Wyck 143
Shonk *v.* Brown 99, 103
Shontz *v.* Brown 248
Shorner *v.* Spear 42
Short *v.* Battle 103
v. Moore 110
v. Stevenson 239
Shottenkirk *v.* Wheeler 409
Shotwell *v.* Lawson 37
v. Mott 120
v. Murray 187
v. Smith 37, 558

Shotwell's Adm'rs *v.* Smith 37
Shoup *v.* Cook 474
Shovelton *v.* Shovelton 72, 73, 74
Shreeve *v.* Brerton 179
Shropshire Union R. R. & C. Co. *v.* The Queen 49
Shryock *v.* Waggoner 61
Shubrick *v.* Guerard 460
Shulte *v.* Hoffman 509, 510
Shulze's Appeal 248
Shute *v.* Shute 495
Shuttleworth *v.* Greaves 303
Sickles *v.* Gloucester Manufacturing Co. 449
Sidney *v.* Shelley 87
Sieveking *v.* Litzler 207
Siggers *v.* Evans 68
Sigourney *v.* Munn 511, 514
Silk *v.* Prime 515, 516, 517, 518, 520, 521, 522, 523
Sillers *v.* Lester 165
Sillitoe, Ex parte 517
Silloway *v.* Neptune Ins. Co. 284
Silvay *v.* Dowell 337
Silver Lake Bank *v.* North 335
Simar *v.* Canaday 207
Sime *v.* Howard 64
v. Norris 219, 222
Simmons *v.* Hendricks 37
v. Tongue 515
Simons *v.* Vulcan Oil Co. 239
Simpson *v.* Hart 327, 409
v. Hotel Company 465
v. Mundlee 353
v. Simpson 115
v. Vaughan 471
Simpson's Lessee *v.* Ammons 151
Sims *v.* Howard 64
v. Lyle 174
v. Ricketts 114
v. Sims 347
v. Spaulding 112
Sinclair *v.* Jackson 145, 146
Singer Manufac. Co. *v.* Domestic Sewing Machine Co. 465
Singer Sewing Machine Co. *v.* Union Buttonhole Co. 462
Singer *v.* Troutman 339
Siter *v.* McClanachan 314
Six *v.* Shaner 81
Skett *v.* Whitmore 64
Skillman *v.* Skillman 80
Skilton *v.* Tiffin 242
v. Webster 37
Skinner *v.* Dayton 179, 509
v. Judson 562
v. Miller 153, 155
Skipp *v.* Harwood 515
Skipwith *v.* Strother 223, 411
Slade *v.* Barlow 489
v. Rhodes 166
Slaney *v.* Sidney 422
Slater *v.* Maxwell 219
Slee *v.* Blee 486
Slemmer's Appeal 448, 478
Slevin *v.* Brown 55
Slim *v.* Croucher 288
Sloan *v.* Cadogan 67
v. Moore 578
Slocombe *v.* Grubb 255
Slocum *v.* Marshall 65, 231
v. Slocum 315
Slocumb *v.* Chicago, Burlington and Quincy Ry. Co. 284
Smaltz's Appeal 364
Smart, Ex parte 351
Smedberg *v.* Mark 581
Smedley's Appeal 166
Smeilman *v.* Onions 433
Smiley *v.* Bell 172
Smith *v.* Attersell 65
v. Auditor-General 43
v. Austin 151
v. Baker 367
v. Bate 546
v. Bell 76
v. Boquet 80
v. Bouvier 223
v. Bowen 77
v. Brotherline 236
v. Burnham 13
v. Carll 9
v. Chadwick 206
v. Cherrill 243, 245
v. Chichester 93
v. Claxton 315, 316
v. Clay 39, 260
v. Constant 357
v. Countryman 213
v. Drake 147
v. Dye 206
v. East Indian Co. 564
v. Fly 390
v. Gardner 435
v. Harrington 55, 120
v. Haytwell 459
v. Iliffe 58
v. Jewett 181
v. Jordan 190
v. Kane 110
v. Kay 217, 231, 232
v. Kelley 478
v. Kernochen 152
v. Knowles 115
v. Leveaux 484
v. Low 268
v. Lowery 409
v. Manning's Executor 151

Smith *v.* Matthews 64
v. Maxwell 58
v. McConnell 417
v. McCrary 307, 315
v. McDougal 187
v. McNeal 287
v. Newton 288
v. Oliver 53
v. Pearson 473
v. Peters 377
v. Phillips 372
v. Poyas 432
v. Richards 206, 214
v. Rockwell 177
v. Sackett 83
v. Sharp 37
v. Sheldon 376
v. Smith 141, 235, 255, 284, 385, 400, 425, 488, 489, 491, 492
v. Starr 106
v. Stone 249
v. Tazewell 312
v. Townshend 237
v. Turner 378
v. Underdunck 385
v. Wheeler 191
v. Wright 81
Smith's Appeal 268
Case 208
Smith & Fleck's Appeal 377, 433
Smith & Wolf's Appeal 527
Smithsonian Inst. Case 119, 121, 136
Smithurst *v.* Edmunds 165, 407, 410
Smoot *v.* Rea 371
Smull *v.* Jones 220
Sneed *v* Atherton 492
Snelgrove *v.* Snelgrove 264, 297, 304, 501
Snell *v.* Dwight 42
v. Elam 83
Snelling *v.* Utterback 80, 83
Snively *v.* Hitechew 274
Snyder's Appeal 106
Snyder *v.* Christ 245, 246
v. Ives 191
v. Snyder 100
v. Wolford 80
Soar *v.* Foster 84
Society, etc., of the Gospel *v.* Town of Hartland 55
Soltau *v.* De Held 438, 439, 440, 441
Somerville Com'rs *v.* Johnson 411
Somes *v.* Skinner 234
Sommerset (Duke of) *v.* Cookson 368
Soper *v.* Guernsey 152
Sorrel *v.* Carpenter 274
Souder's Appeal 478
Souley *v.* Clockmaker's Co. 136
South, Ex parte 167
South Eastern Railway Co. *v.* Brogden 409
South Eastern Railway Co *v.* Phillips 484
Southern *v.* How 456
Souverbye *v.* Arden 66, 67, 90
Southwark & Vauxhall Water Co. *v.* Quick 563
Spackman *v.* Ott 248
Spackelford *v.* Collin 242
Spader *v.* Davis 246, 526, 527
v. Lawler 159
Spain *v.* Hamilton's Administration 168
Spalding *v.* Conzleman 385
v. Preston 223
Spangler *v.* Danforth 365
Sparhawk *v.* Union Passenger R. R. Co. 441
Sparks *v.* Liverpool Waterworks 181
Spead *v.* Morgan 304, 305
Speakman *v.* Forepaugh 378
Spear *v.* Robinson 187
Spear *v.* Spear 141
Speed's Ex'r *v.* Nelson's Ex'r 534
Speer *v.* Crauxter 503
v. Evans 272
v. Speer 489
Speight *v.* Gaunt 145
Spencer *v.* Carr 284
Spencer *v.* The School District 424
Spencer and Newbold's Appeal 237
Spering's Appeal 154, 237, 417
Sperry's Estate 534
Spink *v.* Francis 414
Spirett *v.* Willows 243, 247
Spooner *v.* Lovejoy 72, 74
Sporle *v.* Whayman 357
Sporrer *v.* Eifler 43, 422
Sprang *v.* Allen 157
Springer *v.* Arundel 106
Springer's Estate 143
Springhead Spinning Co. *v.* Riley 465
Springs *v.* Sanders 364
Spurgeon *v.* Collier 153
Squire's Appeal 91, 218
Statts *v.* Bergen 84, 92
Stackpole *v.* Beaumont 225, 227
Stafford *v.* Van Rensselaer 353, 356
Stagg *v.* Jackson 312, 534
v. Insurance Company 284
Staggers *v.* Matthew 106
Staight *v.* Burn 441
Staines *v.* Shore 209
St. Andrew's Church Appeal 461, 463
Stanley's Appeal 139, 234
Stanley *v.* Colt 55
v. Leigh 57
Stanton *v.* Allen 228

Stanton *v.* Hall 100
Stapilton *v.* Stapilton 115, 189
Stapleton *v.* Foreign Vineyard Association 455
Stark *v.* Hunter 304
v. McGowen 198
Starr *v.* Ellis 474
v. Starr 64, 573
State *v.* Baird 546
v. Britton 187
v. Gerard 120
v. Griffith 123
v. Grigsby 546
v. Laies 291
v. McBride 37
v. McGowen 121
v. Ragland 151
v. Reigart 187
v. Warren 130
State Bank *v.* Hastings 166
State of Mississippi *v.* Johnson 424
State of Pennsylvania *v.* Wheeling Bridge Co. 443
State Railroad Tax Cases 424
Statham *v.* Hall 422
St. Clair SchoolBoard's Appeal 424
Stead *v.* Mellor 72, 73
Steamboat Belfast *v.* Boon 212
Stearns *v.* Hall 385
v. Hubbard 385
v. Marsh 350
Steed *v.* Preece 316
Steedman *v.* Weeks 489
Steel *v.* Brown 248
Steele's Appeal 338
Steele *v.* Steele 99
v. Worthington 219
Steer *v.* Crowley 391
Steere *v.* Steere 64, 65
Steiger *v.* Hillen 501
Steinbrook's Appeal 91
Stephen and Wife's Appeal 472
Stephens, Ex parte 327
v. Baird 280
v. Beal 527
v. Black 93
v. Cady 450
v. Stephens 295, 303
Stephenson *v.* Davis 366
v. Wilson 191
Sterling's Appeal 436, 465
Sterne *v.* Beck 180
Sterry *v.* Arden 244, 251
Stevens *v.* Beekman 435, 436
v. Cooper 155, 333, 341
v. Dennett 281, 282
v. Moore 207
v. Morse 271
v. Rutland, &c., Rd. Co. 465
Stevens *v.* Shippen 121
v. Yeatman 509
Stevenson *v.* Taverness 331
Studer *v.* Seyer 372
Steward *v.* Blakeway 511, 513
v. Winters 461
Stewart's Appeal 435, 474
Stewart *v.* Barrow 151
v. Ives 353
v. Kirkland 165
v. Metcalf 376
v. Humford 37
v. Railroad Company 407
v. Stewart 107
St. Felix *v.* Rankin 492
St. George *v.* Wake 254, 255
St. Helen's Sm. Co. *v.* Tipping 439
St. John *v.* Benedict 371
St. Louis Railroad *v.* Green 287
Stickney *v.* Borman 114, 257
Stikeman *v.* Dawson 293
Stile *v.* Mayor, &c., of Griffin 353
Stiles *v.* Brock 471
Still *v.* Spear 61
Stillman *v.* Stillman 333
Stimson *v.* Farnham 291
Stiner *v.* Stiner 230
Stines *v.* Hays 170
Stirling *v.* Forrester 328, 333
Stockbridge Iron Co. *v.* Hudson Iron Co. 190, 469, 470
Stockdale *v.* The South Sea Co. 263
v. Ullery 406, 426
Stockley *v.* Stockley 191
Stockton Union Oil Co. 390
Stoddard *v.* Hart 357
Stoddart *v.* Smith 389
Stokes's Estate 303
Stokes *v.* McKibben 60
Stokoe *v.* Cowan 246
Stone *v.* Chisholm 527
v. Denny 214
v. Great Western Oil Co. 288
v. Hackett 66
v. King 66
v. Liddledale 166
v. Manning 537
Stonehewer *v.* Thompson 151
Stonehouse *v.* Stanshaw 8
Storer *v.* Great Western R. R. Co. 370
v. Great Western Railway Co. 400
Storm *v.* Mann 460
Storms *v.* Storms 335
Storrs *v.* Barker 187, 287
v. Scougale 230
Story *v.* The Norwich Railway 370
v. Windsor 266
Story's Executors *v.* Holcombe 452

Stouffer *v.* Coleman 353
Stourton *v.* Stourton 548
Stout *v.* Allison 293
v. Vance 330
Stover *v.* Bounds 153
Stow *v.* Russell 393
v. Bozeman 207
Stowe *v.* Thomas 452
St. Paul Division *v.* Brown 370
St. Paul & Duluth Rd. *v.* U. S. 166
Strange *v.* Bell 419
Strathmore *v.* Bowes 253, 255
Stratton *v.* Best 303
v. Dialogue 80
Straughan *v.* Wright 489
Streatfield *v.* Streatfield 295, 299, 300, 304
Streeper *v.* Williams 179
Strong *v.* Blanchard 157
v. Converse 499, 500
v. Mitchell 328
v. National Mechanics' Bank 359
v. Williams 538
Struther *v.* Besley 37
Stuart *v.* Kissam 100
v. Sears 190
v. Welch 420
Stuart's Heirs *v.* Coalter 503
Stubb *v.* Lies 189
Stubbs *v.* Sargon 65, 111
Stump *v.* Findlay 305
v. Gadby 198
Sturges *v.* Knapp 465
Sturgis *v.* Champneys 112
v. Galindo 377
Sturt *v.* Mellish 52
Sturtevant *v.* Jacques 378
Stuyvesant *v.* Hall 271
v. The Mayor 370
Styles *v.* Guy 146
Sugden *v.* Crossland 143
Sullan *v.* Providence Tool Co. 37
Sullivan *v.* Portland & Kennebec R. R. 260
v. Portland R. R. Co. 203
v. Tuck 369
Sulphen *v.* Cushman 155
Summers *v.* Bean 368
v. Craig 100
v. Griffiths 219
Sumner *v.* Powell 471
v. Rhodes 271
v. Waugh 264
Sumwalt *v.* Tucker 151
Susquehanna Mut. Fire Ins. Co. *v.* Swank 191
Sutcliff *v.* Isaacs 441
Sutherland *v.* Parkins 377
Sutter *v.* The Dutch Church 465
Sutton *v.* Wilders 146
Suydham *v.* Moore 208
v. The N. W. Ins. Co. 527
Swain *v.* Fidelity Ins. Co. 378
Swaine *v.* Perine 495, 499, 501
Swan's Estate, In re 330
Swan *v.* Frick 67
v. North British Co. 288
v. Patterson 337
v. Swan 492
Swasey *v.* American Bible Society 120
Swayne *v.* Lyon 378
Swedesborough Church *v.* Shivers 37
Sweeney *v.* O'Hara 385
v. Williams 37
Sweeny *v.* Sampson 121
Sweet *v.* Parker 154, 155, 470
Sweetapple *v.* Bindon 57, 314
Sweeting *v.* Sweeting 60
Sweetzer's. Appeal 154, 155
Swetland *v.* Swetland 155
Swift *v.* Arents 242
v. Castle 103
v. Winterbotham 208
Swift's Ex'rs *v.* The Beneficial Soc. 116, 119, 123
Swinburue *v.* Swinburne 83
Swinfen *v.* Swinfen 139
Swinney *v.* Beard 424
Swisshelm's Appeal 93
Switzer *v.* Switzer 115
Swoyer's Appeal 141
Symons *v.* Reid 410
Synnot *v.* Simpson 68

T.

Tabor *v.* Mich. Mut. Life Ins. Co. 198
Taft *v.* Bowker 66, 167
Taite's Case 260
Talbert *v.* Singleton 273
Talbot *v.* Earl of Shrewsbury 548
v. Pierce 515
Taliferro *v.* Taliferro 80
Talley *v.* Courtney 190
v. Robinson 374
Tally *v.* Smith 219
Talmage *v.* Burlingame 337
Tanner *v.* European Bank 419
Tantum *v.* Green 526
Tappan *v.* Deblois 119
v. Evans 527
Tarpley *v.* Poage's Administrator 80
Tarr *v.* Williams 103
Tarver *v.* Tarver 199
Tassell *v.* Smith 158
Tate *v.* Tate 499
v. Williamson 232

Taunton *v.* Morris 112, 113
Tayleur, In re 574
Tayloe *v.* Johnson 307
v. Merchants' Ins. Co. 370
Taylor *v.* Adams 260
v. Attwood 219
v. Benham 60, 146, 307
v. Blanchard 228
v. Bowker 527
v. Bryn Mahr College Tr's. 121
v. Cornelius 159
v. Ely 284
v. Fields 521
v. George 73
v. Gitt 170, 171
v. Guest 217
v. Haswell 61
v. Ins. Co. 37
v. James 84, 373
v. Johnson 232
v. Jones 243, 527
v. Longworth 392
v. Meads 101, 106
v. Patrick 188
v. Plumer 86
v. Pugh 254, 255
v. Roberts 146
v. Staples 66
v. Stibbert 268
v. Taylor 84, 231, 235, 312, 317
v. Van Deusen 329
v. Waters 413
v. Wheeler 194
Taylour *v.* Rochfort 221
Taymen *v.* Mitchell 214
Tazewell *v.* Smith 307, 312
Teal *v.* Walker 156
Tebbetts *v.* Tilton 81
Tedford *v.* Wilson 165
Tee *v.* Ferris 65
Telford *v.* Barney 145
Tempest, In re 136
Tenant *v.* Elliot 248
v. Stoney 68, 100
Tench *v.* Cheese 349
Tenham *v.* Herbert 417
v. Trenchard 94
Tennison *v.* Tennison 114
Terry *v.* Hopkins 253, 255
Texas *v.* Hardenberg 48
Thallhimer *v.* Brinckerhoff 162
Thames Iron Works Co. *v.* The Patent Derrick Co. 359
Thatcher *v.* Omans 55
Thayer *v.* Bacon 288
Thebant *v.* Canera 440
Thellusson *v.* Woodford 133
The King and Holland 52
The People *v.* Sup. Ct. of N. Y. 180
v. Tioga 166
The Queen *v.* Shropshire Union Co. 171, 264
Thetford School Case 132
Third Av. R. R. Co. *v.* New York 418
Third Nat. Bank *v.* Skillings Lumber Co. 420
Thomas's Appeal 158
Thomas *v.* Bartow 259
v. Brown 115
v. Cronise 223
v. Dering 390
v. Ellmaker 123
v. Folwell 103
v. Grand Gulf Bank 271
v. Hearn 333
v. James 425
v. Oakley 478
v. Pullis 281
v. Roberts 546
v. Sheppard 230
v. Walker 80
v. Williams 253
v. Wood 307
v. Wyse 8
Thompson's Appeal 86, 418, 425
Thompson *v.* Adams 93
v. Allen 578
v. Allen County 37
v. Blair 203
v. Bowman 513
v. Brown 529, 530
v. Carpenter 380
v. Cochran 500
v. Derham 424
v. Dougherty 245
v. Dulles 378
v. Eastwood 187, 203
v. Emery 167
v. Finch 146
v. Fisher 485
v. Hudson 180
v. Jameson 387
v. Lee 214
v. Lynch 575
v. Murray 333, 341
v. R. R. Co. 13
v. Sanders 321, 330
v. Sheplar 19
v. Simpson 167, 293
v. Spiers 166
v. Tappin 529
v. Thompson 247, 348
v. Todd 387
v. Van Buren 409
v. Webster 245
v. Whipple 181

Thompson's Executors *v.* Norris 130, 131
Thomson's Lessee *v.* White 218, 258
Thomson *v.* Shakespeare 131
v. Thomson 248
Thorington *v.* Smith 374
Thorley's Cattle Co. *v.* Massam 465
Thorn *v.* Halsey 581
Thorne *v.* Towanda Towing Co. 484
Thornborough *v.* Baker 152, 153, 154
Thorndike *v.* Hunt 40
Thornton *v.* Hawley 312
v. Knox 355
v. Stewart 177
Thorp *v.* McCullum 194
Thorpe *v.* Jackson 471
v. Macaulay 559
Throop *v.* Hatch 64
Thruston *v.* Minke 489
Thurmond *v.* Reese 526
Tibbals *v.* Sargent 577
Ticombe Bank *v.* Harvey 527
Tibbits *v.* Tibbits 73, 304
Tickel *v.* Short 485
Tidd *v.* Lister 112
Tiernan *v.* Bean 353
v. Jackson 167
v. Roland 365, 380, 391
Tiernay *v.* McGarity 166
v. Wood 67
Tiffany *v.* Anderson 290
Tilford *v.* Burnham 527
Tilley *v.* Thomas 391
Tillinghast *v.* Chaplin 512
v. Coggeshall 57
Tillmes *v.* Marsh 37, 503
Tilton *v.* Hunter 271
v. Nelson 292
v. Tilton 382
Timberlake *v.* Parish 303
Timms *v.* Shannon 151
Timon *v.* Whitehead 282
Tindal *v.* Harkinson 215
Tingle *v.* Fisher 167
Tinkler *v.* Met. Board of Works 437
Tinsley *v.* Anderson 336
v. Lacy 452
Tipping *v.* Eckersley 461
v. St. Helen's Smelting Co. 439, 441, 442
Titcomb *v.* Morrill 90
Tobey *v.* McAllister 353, 355
v. The County of Bristol 371
Tod *v.* Baylor 498
Todd's Appeal 98, 99
Todd *v.* Campbell 8, 154
v. Gee 477
v. Grove 231
v. Lee 103, 527
Todd *v.* Taft 368
Toker *v.* Toker 67
Tollet *v.* Tollet 193, 194
Tolson *v.* Tolson 75
Tomb's Appeal 248
Tomlinson *v.* Harrison 581
v. Ward 577
Tomson *v.* Judge 231
Tongue *v.* Morton 274
v. Nutwell 43
Tooth *v.* Hallett 170
Topham *v.* Duke of Portland 257
Topp *v.* Williams 503
Torbet *v.* Twining 100
Torr's Estate 534
Totten *v.* United States 564
Tourney *v.* Sinclair 115
Tourville *v.* Naish 260
Towle *v.* Leavitt 209
v. Mack 144
Town *v.* Needham 492
Townley *v.* Bedwell 321
Townsend *v.* Fenton 385
v. Houston 385
v. Westcott 245
v. Windham 164, 169
Townshend *v.* Stangroom 381
Township of Boomer *v.* French 203
Tracey *v.* Lackett 230
Tracy *v.* Keith 103
Trask *v.* Green 526
Treadwell *v.* Brown 515
Treasurer *v.* Commercial Co. 368
Treat's Appeal 130
Treftz *v.* King 14
Tremain's Case 548
Tremont Nail Co. 167
Trenton Banking Co. *v.* Duncan 282
v. Woodruff 99
Trenton, etc., *v.* McKelway 410
Trest *v.* Child 167
Trexler *v.* Miller 199
Trigg *v.* Read 187, 189
Trimm *v.* Marsh 151, 152
Triplett *v.* Parmalee 433
Tripp *v.* Colwell 100
v. Hasceig 196
Trippe *v.* Lowe 526
Tritt *v.* Crotzer 56, 63, 65
Trotter *v.* Smith 236
v. Trotter 113
v. Watson 243
Trough's Estate 66
Troup *v.* Haight 486
Troxell *v.* Lehigh Iron Co. 291
True *v.* Houghton 368
Troy and Boston Rd. Co. *v.* Boston, etc., Rd. Co. 435
Troy City Bank *v.* Wilcox 261, 265

Truebody *v.* Jacobson 353
Truesdale *v.* Ward 287
Trull *v.* Eastman 220
v. Skinner 153
Trust *v.* Delaplaine 209
Trustees *v.* Chambers 130
v. Hoessli 436
Tryon *v.* Munson 151
Tuck *v.* Downing 207
Tucker *v.* Andrews 110, 253
v. Burrow 84
v. Kenniston 474, 575
v. Oxley 518
v. Thurstan 52
v. Wilson 358, 359
Tucker's Appeal 55
Tuckley *v.* Thompson 357
Tulk *v.* Moxhay 263, 463
Tullett *v.* Armstrong 104
Tully *v.* Harloe 159
Tunesma *v.* Shuttler 527
Tunnard *v.* Littell 82, 83
Tunno *v.* Trezevant 515
Tunstall *v.* Boothby 166
Turnbull *v.* Cadsden 214
Turner *v.* Adams 526, 527
v. Burrows 332
v. Collins 231
v. Harvey 213
v. Ker 154
v. Letts 352, 357
v. Major 507
v. Morgan 491
v. Morris 498
v. Pettigrew 86
v. Scott 67
v. Spooner 400
v. Turner 231, 232
Turnpike *v.* Ryder 440
Turton *v.* Benson 170
v. Turton 100
Tuttle *v.* Jackson 273
Tweddell *v.* Tweddell 220
Twort *v.* Twort 433
Twyne's Case 241, 243, 352, 358
Tyler *v.* Black 206, 207
v. Peatt 527
v. Tuel 166
v. Yates 221
Tyler *v.* Lake 100
Tyree *v.* Williams 380
Tyrrel's Case 53
Tyrrell *v.* Bank of London 235, 238
Tyson *v.* School Directors 198
v. Watts 377

U.

Udall *v.* Kenney 113
Uhler *v.* Semple 511
Unangst's Appeal 465
Underhill *v.* Allen 385
Underhill *v.* Horwood 471
Ungley *v.* Ungley 385
Union Bank *v.* Baker 80
v. Edwards 330
v. Walker 80
Union Canal Co. *v.* Young 284
Union College *v.* Wheeler 81
Union Dime Savings Co. *v.* Wilmot 294
Union Pacific Rd. Co. *v.* Cheyenne 424
Union Trust Co. *v.* Ill. Midland Ry. 344
v. Souther 344
United States *v.* Gear 436
v. Hooe 159
v. Moses 564
v. New Orl. Rd. Co. 165
v. Parrott 460
v. Price 471
v. Vaughan 168
v. Wagner 564
United States Bank *v.* Biddle 203
v. Carrington 80, 83
v. Daniel 189
v. Housman 90
v. Huth 167
United States, President of, *v.* Drummond 121
Unity Association *v.* King 293
Universities of Oxford and Cambridge *v.* Richardson 449
Upshaw *v.* Upshaw 304
Upton *v.* Tribilcock 212, 239
Urch *v.* Walker 137
Urmey's Executors *v.* Wooden 130
Utica (Bank of) *v.* Finch 150

V.

Van Alst *v.* Hunter 9
Van Amee *v.* Jackson 74
Van Bergen *v.* Van Bergen 400
Vanbuskirk *v.* Hartford Ins. Co. 169
Vance *v.* Blair 505
v. Campbell's Heirs 227
v. Johnson 151
v. Nogle 99
Vanderberg *v.* Palmer 67
Vanderstegen *v.* William 52
Van Deusen *v.* Sweet 291
Vandike's Appeal 522
Van Doren *v.* Robinson 377
v. Todd 355
Van Dusen *v.* Parley 258
Van Duyne *v.* Van Duyne 72, 295
v. Vreeland 570
Van Dyke's Appeal 297, 299, 305
Vane *v.* Lord Barnard 434
v. Vane 203
Van Epps *v.* Harrison 207
Van Horne, In re 234

Van Horne *v.* Fonda 92
Van Kirk *v.* Skillman 103
Van Meter *v.* McFaddin 272, 357
Van Nest *v.* Latson 160
Van Rensselaer *v.* Kearney 280
Van Riper *v.* Van Riper 538
Vansittart *v.* Vansittart 115
Van Syckel *v.* Emery 37
Van Weel *v.* Winston 237
Van Winkle *v.* Curtis 436
v. Johnson 328
Van Zant *v.* Davies 83
Varick *v.* Edwards 164
Varnes's Appeal 99
Varney *v.* Pope 440
Varrick *v.* Edmunds 220
Vason *v.* Ball 151
Vaughan *v.* Barclay 47
v. Buck 112
v. Halliday 351
v. Vanderstegen 198
Vaux *v.* Park 61
Veasey *v.* Doton 215
Veazie *v.* Williams 209
Venable *v.* Coffman 130
Venderhaize *v.* Hugues 151, 153
Venezuela Central R. R. Co. (Directors of) *v.* Kisch 208
Vennum *v.* Davis 407
Vermont & C. & N. W. Rd. Co. 166
Verner's Estate 142
Vernon *v.* Vernon 71
Verrier *v.* Guillou 284
Very *v.* Levy 379
Viant's Settlement 58
Vick *v.* Percy 37
Vidal *v.* Girard's Executors 117, 118, 119, 120, 121, 134, 136
Viele *v.* Hoag 409
Villa *v.* Rodriguez 153, 155
Villers *v.* Beaumont 67
Vint *v.* Paget 158
Visme, de, In re 84
Vizonneau *v.* Pegram 103
Vollmer's Appeal 441
Voorhees *v.* De Myer 378
v. Presbyterian Church 55
Voorhis *v.* Murphy 191
Voshell *v.* Hynson 577
Voyle *v.* Hughes 164
Vreeland *v.* Blauvelt 380
v. Van Horn 66

W.

Wack *v.* Sorber 385
Waddell *v.* Bech 37
Wade *v.* American College Society 130
v. Fisher 99
Wadhams *v.* Gay 66
Wafer *v.* Mocato 181
Waggoner *v.* Speck 385
v. Minter 190
Wagstaff *v.* Smith 55, 101
Wainewright *v.* Read 389
Wainford *v.* Heyle 102
Wake *v.* Conyers 503, 504
Walcott *v.* Keith 358
Waldron, In the Matter of 546
Waldron *v.* Simmons 37
Wales *v.* Coffin 43
v. Mellin 152
Walker's Estate 347, 534
Walker *v.* Brungard 80
v. Eastern Counties Railway Co. 377
v. Flint 287
v. Hill's Executors 42
v. Johnson 151
v. Kee 365
v. Laflin 489
v. Morris 529
v. Shore 138
v. Symonds 141
v. Vaughn 165
v. Walker 130, 144
v. Wheeler 181
Wall *v.* Arrington 382
v. Colshead 315, 316
Wallace's Appeal 335, 337
Wallace *v.* Bowers 84
v. Coston 103
v. Duffield 86
v. McCullough 86
v. Wainwright 49
Wallen's Appeal 338
Waller *v.* Armistead's Administrators 234, 253
v. Dalt 222
Wallgrave *v.* Tebbs 65
Walling *v.* Aikin 158
Wallinger *v.* Wallinger 300
Wallis *v.* Everard 495
v. Freeman 511
v. Truesdell 289
Wallwyn *v.* Lee 264, 275, 501
Walmesley *v.* Booth 236
Walpole *v.* Oxford 377
Walrond *v.* Walrond 115
Walter *v.* Heller 409
v. Selfe 439, 441
Walters *v.* Farmers' Bank of Virginia 37
v. Morgan 387
v. Northern Coal Mining Co. 504
Walton *v.* Crowley 456, 458
Walworth *v.* Holt 508

F

Walwyn *v.* Coutts 68
Ward *v.* Amory 110
v. Brown 575
v. Grey 72
v. Lewis 68
v. Peloubet 72
v. Turner 70
v. Van Bokkelen 203
Warde *v.* Warde 544, 546
Warden *v.* Jones 344
Ware *v.* Owens 512
Ware *v.* Richardson 99
Warfield *v.* Warfield 492
Waring, Ex parte 351
Waring *v.* Cram 540
Warner *v.* Bates 71, 72, 73, 74
v. Bennett 181
v. Daniels 219
v. Hall 268
v. Hopkins 417
v. Moran 526
v. Price 330
v. Waterloo Agr. Works 337
Warre (Ship) In re 165
Warren *v.* Farmer 517
v. Haley 100
v. Richmond 268
Warren & Franklin Ry. Co. *v.* Clarion Land Co. 404
Warrick *v.* Warrick 58, 268
Warriner *v.* Richards 67
v. Rogers 67, 168
Warring *v.* Ayers 377
Washburn's Appeal 37, 440
Washburn *v.* Bank of Bellows Falls 515
v. Goodman 514
Washington R. R. Co. *v.* Alexandria R. R. Co. 94, 143
Washington University *v.* Green 400
Waterer *v.* Waterer 511
Waterlow *v.* Bacon 409
Waterman *v.* Dutton 190
v. Matteson 151
Waters *v.* Howard 369, 371
v. Stewart 151
v. Stickney 199
v. Tazewell 106, 227
Watertown *v.* Cowen 461
v. Mayo 424
Wathen *v.* Smith 538
Watkins *v.* Collins 475
v. Gregory 154
v. Specht 62
v. Watkins 115
v. Weston 65
v. Williams 489
v. Worthington 336
Watlington *v.* Houley 274
Watney *v.* Wells 509
Watson *v.* Bagaley 167
v. Bothwell 199
v. Brickwood 347
v. Hunter 431
v. Jones 465
v. Knight 284
v. Sutherland 37, 435
v. Wells 268
Watson's Executor *v.* McLaren 170
Watts's Appeal 237, 260, 417
Watts *v.* Cummins 207
Waugh *v.* Riley 160
Way's Trusts 67, 168
Wayland *v.* Tucker 329
Wayman *v.* Jones 146
Waynesburg College, Appeal of, 66
W. B. of Scotland *v.* Addie 198
Weatherly *v.* Weatherly 154
Weaver *v.* Carpenter 202
v. Shryock 471
Webb *v.* Bird 441
v. Bowman 177
v. Hughes 393
v. Jones 347
v. Ledsam 145
v. London and Portsmouth R. R. Co. 376
v. Rice 470
v. Rorke 153
v. Shaftesbury 297
v. Wools 72
Webber *v.* Gage 439, 440
v. Taylor 268
Weber *v.* Marshall 369
v. Weatherby 284
v. Weitling 219
Webster *v.* Clark 527
v. Cook 220
v. Folsom 526
v. Harwinton 424
v. Maddox 273
Wedgewood *v.* Adams 376
Weed *v.* Grant 407
v. Peirce 242, 526
v. Small 485
Weeding *v.* Weeding 321
Weeks *v.* Robi 202
v. Segs 104
Weide *v.* Gehl 155
Weigel *v.* Walsh 436
Weil *v.* Record 424
Weiland *v.* Kobeck 293
Weir *v.* Bell 206
v. Kirk 441
Weis *v.* Fannshill 68
Weise's Appeal 376, 385
Weist *v.* Garman 219
Welby *v.* Thornagh 199
Welch *v.* Welch 114

Welland *v.* Hathaway 289
v. Huber 392
Welles *v.* Castles 55
v. Yates 191, 469
Wellesley *v.* Duke of Beaufort 544, 546
Wellesley *v.* Mornington 256
v. Wellesley 165
Wellford *v.* Chancellor 93
Wellington *v.* Railroad Co. 400
Wellock *v.* Gresham 575
Wells *v.* Beall 498, 501
v. Buffalo 575
v. McCall 98, 106
v. Pierce 37
v. Waterhouse 217
Welsh *v.* Bayaud 395
v. Usher 357
Welton *v.* Divine 84
Wendell *v.* Van Rensselaer 236, 287
Wesco's Appeal 538
Wesley Church *v.* Moore 37, 331
West *v.* Bank of Rutland 341, 343
v. Belches 337
v. Bundy 385
v. Howard 114
v. Walker 436
v. West 100, 103
Westbrook *v.* Harbeson 382
Westby *v.* Westby 189
Westcott *v.* Edmunds 85
Western *v.* McDemott 263, 404, 463
Western Germ. Sav. Bank *v.* Farm. and Drover's Bank 191
Western Pa. Rd. Co., Appeal 437
Western R. R. Co. *v.* Babcock 191, 376
Westmeath *v.* Westmeath 115
Westminster (Bank of) *v.* Whyte 470
Wethered *v.* Wethered 164
Wharton *v.* Douglass 258
v. May 220
Wheatley *v.* Slade 390
Wheeler *v.* Kidder 84
v. Kirtland 81, 258
v. Philadelphia 424
v. Rice 402
v. Sage 42
v. Smith 188
v. Van Wart 509
Whelan *v.* Whelan 230, 235
Whelen's Appeal 188
Whichcote *v.* Lyle 55
Whicker *v.* Hume 119, 121, 136
Whistler *v.* Webster 300, 303
Whitaker, Matter of 550
v. Robinson 376
Whitbread *v.* Brockhurst 387
White's Trusts 77
White *v.* Booth 440
v. Boyce 200
White *v.* Cassanave 353
v. C. Nat. Bank 191
v. Cohen 441
v. Dougherty 355, 515
v. Fisk 130
v. Flora 219
v. Fratt 37
v. Hall 47
v. Nuptial Benefit Union 224
v. Port Huron R. R. 181
v. Rittenmeyer 152
v. Schuyler 368
v. Sheldon 83
v. White 333
v. Williams 355
Whitebread *v.* Smith 471
Whitehead *v.* Kitson 465
v. Peck 222
Whitehorn *v.* Hines 230
Whitehouse's Case 260
Whiteley *v.* Stewart 103
White Mountain R. R. Co. *v.* Bay State Iron Co. 359
Whitesides *v.* Cannon 103
Whitewater, etc., Co. *v.* Comegys 420
Whitfield *v.* Hales 546
v. Rogers 439
Whitforth *v.* Gaugain 276
Whiting *v.* Barney 563
v. Burke 328
v. Whiting 77
Whitmore *v.* Skiverick 151
Whitney *v.* Gould 64
v. Holmes 289
v. Smith 142
v. Stevens 37
v. Stone 370
v. Whitney 470
Whitaker *v.* Hudson 441
Whittaker *v.* Howe 228, 464, 507
Whittemore *v.* Whittemore 389
Whitten *v.* Jenkins 99
v. Whitten 84
Whittick *v.* Kane 151
Whittington *v.* Wright 293
Whittle *v.* Skinner 358
Whitton *v.* Whitton 489
Whitworth *v.* Whydden 577
Whyte *v.* Meade 237
Wicke *v.* Mitchell 103
Wickes *v.* Clark 247
Wickham *v.* Berry 55
Wickliffe *v.* Breckenridge 274
Wiard *v.* Brown 575
Wied *v.* Case 207
Wieland *v.* Kobeck 293
Wier's Appeal 441
Wigg *v.* Tyler 552
v. Wigg 266

Wiggins *v.* Armstrong 459
Wiltbanks *v.* Wiltbanks 295
Wilbur *v.* Flood 202
Wilcocks *v.* Wilcocks 46, 536
Wilcox *v.* Bates 155
v. Hill 268
v. Howell 294
v. Wheeler 435
v. Wilcox 512
Wilde *v.* Fort 391
v. Fox 385
Wilder *v.* Keeler 518
Wilderman *v.* Baltimore 130
Wiles *v.* Wiles 110
Wiley *v.* Ewing 151
Wiley's Ex'rs Appeal 365
Wilhelm's Appeal 37
Wilhite *v.* Roberts 166
Wilkes *v.* Holmes 194
Wilkin *v.* Wilkin 482
v. City of St. Paul 437
Wilkins *v.* French 152
Wilkinson *v.* Dent 302, 303
v. Gelly 193
v. Searcy 285
v. Tousley 223
Wilks *v.* Fitzpatrick 110
Willard *v.* Eastham 103
v. Tayloe 43, 371, 374
Willard *v.* Willard 65
Willet *v.* Sanford 53
v. Winnell 153
Willets *v.* Willets 73
Williams's Appeals 55, 114, 257
Williams *v.* Avery 100
v. Bailey 115
v. Baker 293
v. Bayley 230
v. Beard 152
v. Beazley 213
v. Bradley 209
v. Brown 80, 527
v. Callow 113
v. Carle 253
v. Champion 187
v. Claiborne 100
v. Craig 333
v. Davis 245
v. Evans 385, 392
v. Fitzhugh 222, 474
v. Green 180
v. Hollingsworth 83
v. Johnson 458
v. Kershaw 131
v. Lambe 264, 501
v. Leach 55
v. Medlicot 357
v. Mitchell 200
v. Pearson 130
Williams *v.* Roberts 88, 356
v. Savage Manufacturing Co. 220, 485, 486
v. Sprigg 268
v. Spurr 213
v. Stratton 357
v. Waters 99
v. Wiggand 489
v. Williams 74, 84, 235, 268 427
Williamson *v.* Berry 542, 543, 549
v. Brown 268
v. New Jersey Southern R. R. 165
v. Wilson 509, 510, 578
Williard *v.* Williard 80
Williman *v.* Holmes 100
Willing *v.* Peters 322
Willis *v.* Gatzman 190
v. Henderson 184
v. Jernegan 485
v. Kymer 77
v. Willis 83
Willoughby *v.* Middleton 295, 304
v. Moulton 302
Wills's Appeal 141, 334
Wills *v.* Slade 489
v. Wood 260
Wilmer *v.* Farris 385
Wilmot *v.* Maccabe 259
v. Pike 264
Wilson's Appeal 189
Wilson *v.* Anthony 260
v. Arny 303
v. Daniels 253
v. Drumrite 153
v. Getty 473
v. Hart 263, 268, 463
v. Joy 203
v. Mallett 484
v. McDowell 155
v. Northampton and Bunbury Junc. R. R. Co. 563
v. O'Leary 539
v. Patrick 154
v. Russell 159
v. Troup 92
v. Williams 380
v. Wilson 115, 165
Winch's Appeal 425
Winchell *v.* Edwards 283
Winebrenner *v.* Colder 465
Winfield *v.* Bacon 409
Wing *v.* Cooper 154, 155
Wingate *v.* Dail 585
Wingfield *v.* Crenshaw 440
Winslow *v.* Cummings 122
v. Noble 43
Winston *v.* Gwathmey 216

Winter's Appeal 215
Winter *v.* Lord Anson 355
v. Ludlow 9
Wintermute *v.* Snyder 187, 219
Winton *v.* Hart 284
Wintour *v.* Clifton 303
Wise *v.* Shepherd 342
Wiseley *v.* Findlay 487
Wistar's Appeal 142, 144, 182, 231, 237, 376
Wistar *v.* McManes 407, 560
Wistervelt *v.* Haff 268
Wiswall *v.* McGown 37
Witczinski *v.* Everman 159
Witham *v.* Brooner 55
Witherill *v.* Wiberg 151
Withers *v.* Carter 342
v. Yeadon 77
Withy *v.* Cottle 368
Witman *v.* Lex 117, 118, 130
Witter *v.* Richards 515
v. Witter 52
Wolcott *v.* Robins 37, 503
Wolfe *v.* Corby 64
v. Scarborough 503
Wolford *v.* Herrington 218, 258
Wolf's Appeal 527
Wollaston *v.* King 300
v. Tribe 67
Wollstonecroft, In the Matter of 546
Womack *v.* Austin 234
Wonson *v.* Fenno 378
Wood *v.* Barker 249
v. Burham 57
Wood *v.* Cone 315
v. Cox 65
v. Dialogue 166
v. Dodgson 337
v. Downes 236
v. Goff 202
v. Leland 330
v. Little 487, 491
v. Mann 264
v. Patterson 191
v. Seely 294
v. Shepherd 370
v. Sutcliffe 439
v. Trask 151
v. Union, etc., Association 474
v. Wood 546
Woodbridge *v.* Irslee 37
v. Perkins 169
Woodbury Sav. Bank *v.* Ins. Co. 191
Woodcock *v.* Bennett 478
Woodlee *v.* Burch 96
Woodman *v.* Freeman 37, 200, 395, 478
Woodruffe *v.* Water Power Co. 362
Woods *v.* Bailey 353
v. Farmere 268, 271
Woods *v.* Hall 209
v. Hilderbrand 152
v. Monroe 417
v. Wallace 153
Woodward *v.* Harris 377
v. Lazar 456
v. Miller 209
v. Schalzell 581
Woodworth *v.* Van Buskerk 409
Woodyeer *v.* Schaffer 441
Wooldridge *v.* Norris 331
Woollam *v.* Hearn 155, 258, 376, 381, 382, 470
Woolmer's Estate 88
Woolridge *v.* Woolridge 300
Wordekoff *v.* Evers 37
Work *v.* Brayton 356
v. Harper 271
Worley *v.* Tuggle 187, 190
Wormald *v.* Maitland 273
Wormer *v.* Waterloo Agr. Works 337
Worrell's Appeal 141
Worrell *v.* The Church 407
Worsley *v.* De Mattos 261
v. Scarborough 274
Worth *v.* McAden 146
Worthington *v.* Scribner 564
v. Tormey 359
v. Wiginton 304
Worthy *v.* Tate 177
Wotton *v.* Copeland 489
Wragg *v.* Comp. Gen. 353
Wray *v.* Wray 230
Wren *v.* Kirton 139
Wright *v.* Atkinson 333
v. Atkyns 73
v. Brown 103
v. Ellison 167
v. Grover 336
v. Gully 215
v. Henderson 151
v. Hunter 329
v. Maidstone 177
v. Marsh 487
v. Miller 66
v. Pearson 57, 65
v. Pucket 385
v. Rose 320
v. Snowe 293
v. Tatham 573
v. Trustees of Methodist Episcopal Church 315
v. Vanderplank 231, 235
v. Wright 105, 164, 165, 315
Wurts *v.* Page 312, 314
Wyatt *v.* Barwell 272
v. Watkins 165
Wyche *v.* Green 372, 471
Wyncoop *v.* Cowing 153

Wynn *v.* Brooke 330, 331
v. Newman 408
Wynne *v.* Alston 353
v. Jackson 412
v. Price 368
v. Trunstall 492
Wythes *v.* Lee 356

Y.

Yale *v.* Dederer 103
Yard's Appeal 133
Yard *v.* Patton 66
Yarnall's Appeal 55, 57
Yates *v.* Jacob 151
v. Tisdale 421
v. Yates 154
Yeackel *v.* Litchfield 92, 94
Yeates *v.* Groves 167
v. Pryor 215
Yeister *v.* Fortner 271
Yonge *v.* Reynell 328
York *v.* Gregg 214
v. Landis 335
York (Mayor of) *v.* Pilkington 424, 503
Yost *v.* Devault 377
Young *v.* Bumpass 213
v. Burton 368
v. Frost 389
v. Graff 103
v. Martin 74
v. Rathbone 378
v. Vough 284
v. Wood 355
v. Young 37, 100, 103, 347
Youngman *v.* Elmira R. R. 151, 152 274
Youst *v.* Martin 267
Yovatt *v.* Winyard 427
Yule *v.* Yule 113

Z.

Zane's Will 130
Zeisweiss *v.* James 122, 130, 131
Zerbe *v.* Miller 243
Ziegler *v.* Long 342
Zimmerman *v.* Davis 228
v. Streeper 66
Zinc Co. *v.* Franklinite Co. 440
Zollman *v.* Moore 187, 264, 275
Zuchtmann *v.* Roberts 281
Zuver *v.* Lyons 155

THE

PRINCIPLES OF EQUITY.

INTRODUCTION.

CHAPTER I.

RISE AND PROGRESS OF THE HIGH COURT OF CHANCERY.

1. Definition of equity.
2. Importance of the historical view of equity.
3. Early English courts; the councils of the king.
4. Ordinary council, or *curia regis*: Exchequer and Common Pleas.
5. Court of King's Bench.
6. Position of the chancellor.
7. Origin of his extraordinary jurisdiction.
8. Cases in which this jurisdiction was exercised.
9. General conclusions deduced from the above—writ of subpœna—pleadings and evidence.
10. Progress of the jurisdiction of the chancellor.
11. Changes in the English system introduced by Act of August 5, 1873.
12. Principles of equity adopted in the United States.
13. Jurisdiction of the federal courts.
14. Changes of mode of procedure in some of the States.
15. Classification of the states upon this subject.

1. EQUITY is that system of justice which was administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction.

This definition is rather suggestive than precise; and invites inquiry rather than answers it. But this must necessarily be so Equity, in its technical and scientific legal sense, means neither natural justice nor even all that portion of natural justice which is susceptible of being judicially enforced. It has, when employed in the language of English law, a precise, definite and limited signification, and is used to denote a system of justice which was administered in a particular court—the nature

and extent of which system cannot be defined in a single sentence, but can be understood and explained only by studying the history of that court, and the principles upon which it acts. In order to begin to understand what equity is, it is necessary to understand what the English High Court of Chancery was, and how it came to exercise what is known as its extraordinary jurisdiction. Every true definition of equity must, therefore, be, to a greater or less extent, a history.[1] This history has become, so to speak, rounded and complete by the passage of the "Supreme Court Judicature Act of 1873," and its amendments, whereby the judicial system of England has been recast, and the distinction between courts of equity and courts of law abolished.[2] By that act it was, in substance, provided, that, after the second day of November 1874, the administration of justice in all courts should be regulated by the principles of equity; and its passage, notwithstanding the many difficulties which have arisen in carrying it into practical effect, may be considered as the final triumph of those principles, after a struggle of many centuries' duration, and as a full recognition of their usefulness and wisdom.

2. Nor is this historical character of the definition of equity any the less to be regarded in the United States than in England.

In some States of the Union the principles of equity are administered through the medium of common-law or statutory forms;[3] in some, the common-law judges act also as chancellors; and in a third class courts of chancery (by that name) exist. All of these look for their guidance to the principles which were developed in the English Court of Chancery,[4] and the first

[1] So, also, the *Æquitas* of the Roman law can only be defined by tracing the history of that law. It is almost as incapable of definition in a single sentence as the English "equity," with which, by the by, it should not be confounded. See Maine's Ancient Law, chap. iii. The same author describes or defines English equity as "the jurisprudence of the Court of Chancery." Id. 44.

[2] 36 and 37 Vict. c. 66; L. R. 8 Stats. 306.

[3] See Pollard *v.* Shaffer, 1 Dal. 213; Jordan *v.* Cooper, 3 S. & R. 585; Church *v.* Ruland, 14 P. F. Sm. 441.

[4] This guidance may be said to have been, in some instances, of a personal character. See remarks of Chief Justice Shippen in Levy *v.* Bank of United States, 1 Binn. 27, 37 (Story's Eq. Jurisp., § 130, note 1), as to what he had heard Lord Hardwicke say.

inquiry of the student in this branch of law must always be directed to the origin and growth of that tribunal, and the character of the relief which it administered.

3. To appreciate the nature of this equitable relief, and the reason why redress of this peculiar sort came to be afforded by the chancellor, we must look, for a moment, at the general system of English remedial law as it existed in early times.

According to the plan which was established after the Norman Conquest, the local tribunals which had existed under Edward the Confessor, and which consisted of the county, hundred, and borough courts, together with the manor courts and courts baron, were retained; but the supreme judicial (and, indeed, all other) authority was vested in the king, assisted by his councils.

These councils were two in number—the great council, afterwards called the parliament, and the small or ordinary council, which advised the king during the intervals between the sessions of the great council, but which appears to have formed part of the latter when in session.[1]

The great council was composed of the bishops, earls, and barons, and such knights as held of the king *in capite*. Its duties were perhaps as much judicial as legislative, and in both branches its action was advisory rather than potential.[2] The king, in fact perhaps, and certainly in theory, enacted laws and redressed particular grievances (of which complaints were made by petition) with the advice and assistance of the magnates of the realm; and although modern English legislation has departed widely from the ancient in substance, its theory is in this respect still the same, and statutes are still supposed to owe their existence to the will of the sovereign after taking the counsel of Parliament; that is, the sovereign is assumed (by the language of all acts of Parliament) to *enact* laws, the lords and commons consenting to the enactment.

It is unnecessary to trace the growth and powers of the great council. To it indifferently with the smaller council was for-

[1] See 1 Spence Eq. 328, and notes.

[2] "Generally speaking, indeed, as regards all matters besides taxation, it was the *advice* even of the Lords rather than their *assent* that the king appears to have required." 1 Spence Eq. 266.

merly applied the name of *curia regis*—a term which was subsequently used to designate the latter council only, and the meaning of which was afterwards still further narrowed so as to apply to the Court of King's Bench alone.

4. The ordinary council of the king was composed of such barons of the realm as were selected by him; certain officers of the palace, such as the constable, marshal, chamberlain and others; and to these were afterwards added persons learned in the law, who were styled *justiciarii*, together with other sometimes specially summoned by writ from the chancellor's office.[1] This council was the great judicial centre of the kingdom, from which all justice emanated; not that the council had, as a body, in the early stage of its existence, the attributes of a court, but simply because the supreme authority, including the supreme judicial power, was vested therein.[2] The term *curia regis*, as applied to the council, was used in the sense of the royal residence or household, frequented by the nobles and magnates of the realm, where the king sometimes sat in person with the chief justiciary and chancellor, attending (among other things) to complaints of grievances, which were originally solely as to revenue.[3] The same term (*curia regis*) was applied to the county courts, but in a different sense, as they were the *king's courts* of justice.[4] The *curia regis*, or council, appears to have become in the reign of Henry I. the regular court of ultimate appeal from all the courts of ordinary jurisdiction.[5] Out of this royal court, or council, courts of justice (properly so called) of original jurisdiction gradually arose, and their origin and manner of growth appear to have been briefly as follows:

[1] 1 Spence Eq. 329; 1 Foss's Judges 10.

[2] "The curia regis," says Mr. Spence, speaking of the time of Glanville (A. D. 1179, 1180), "can hardly yet be considered as designating a distinct judicial tribunal; *concilium* and *curia* are sometimes used as synonymous even by Bracton." 1 Spence Eq. 119, note *c*.

[3] 1 Reeves's Hist. of English Law 85, Finlason's note. 1 Spence Eq. 102. Mr. Finlason's notes to Reeves have been very severely criticized (see a notice by Henrich Brunner, translated for the American Law Review of October, 1873, vol. viii., No. 1), but his conclusions upon this point seem to be sound. See also article in Edinburgh Review, vol. 33, p. 11.

[4] 1 Reeves's Hist. Eng. Law 84, and note.

[5] 1 Spence Eq. 107; 1 Foss's Hist. Judges 9.

The oldest court (in the strict sense of the term) whose existence can be distinctly traced is the Exchequer.[1] The Exchequer was originally only an *office*, ordained for matters of the king's revenue; and where, subsequently, two knights (or barons), two clerks, and two men learned in the law, were assigned to hear and determine these matters. The persons so assigned were styled Barons of the Exchequer, the term employed to this day. In process of time common suits, *i. e.*, suits between subject and subject, came to be brought in the Exchequer, perhaps because it was felt that justice could be more impartially and learnedly administered by the Barons of the Exchequer than in the ordinary county courts.[2] Now, the court or household of the king was, it will be remembered, ambulatory; it accompanied the king in his journeys, and business, both legislative and judicial, was transacted at the different places where the court happened to be held. This, as is well known, was the occasion of great inconvenience so far as common suits or pleas were concerned, as the suitors were thus obliged to travel to different parts of the kingdom in order to obtain redress. Hence, the celebrated provision of Magna Charta enacted that common pleas should no longer follow the king, and hence the Court of Common Pleas arose as a distinct tribunal fixed by law at Westminster.

5. It has been already stated that the county courts, which were of criminal as well as civil jurisdiction, were retained after the conquest, owing to the popularity of these tribunals, and to the tenacity with which people clung to their old institutions.[3] These somewhat tumultuous courts (or assemblies, as they might more properly be called) were under the presidency of the sheriff, who was appointed by the king. In order to insure a proper administration of the law, and to increase the royal influence, it became customary to appoint the sheriffs from the

[1] Edinburgh Review, vol. 33, page 11; notes to Reeves's Hist. Eng. Law, vol. 1, page 85 (Finlason).

[2] See article in Edinburgh Review, vol. 33, page 12. The limits of the jurisdiction of the different courts were not, in early times, defined with very great precision. Thus the Court of Exchequer exercised jurisdiction as a court of equity, principally, however, in cases of tithes. But this jurisdiction never attained any great importance, and was finally, by Stat. 5 Vic. c. 5, § 1, transferred to the Court of Chancery. Mitford's Pleading 6.

[3] 1 Reeves's Hist. Eng. Law, Finlason's Notes 80.

justices attached to the king's household, or *curia regis*;[1] and sometimes men learned in the law were sent down by special commission to hold these courts. It thus came to pass that itinerant justices went down from the *curia regis* to the counties, and there held the county courts. But one step more was necessary to constitute a distinct tribunal of general jurisdiction, namely, that before the judge went down to try the cause, the exact matters in dispute should be settled, and the questions of law separated and determined. Hence the king's justices who met for this purpose, and who were afterwards despatched into the different counties, to preside over the trial of the issues thus made up, came to constitute a distinct tribunal, the King's Bench. To this tribunal, also, the name of *curia regis* has been applied.[2] This result was probably brought about by Glanville, in the reign of Henry II.[3] In this way the *curia regis*, as it were, drew to itself and absorbed the jurisdiction of the county courts;[4] and the vast increase of business, consequent upon this change, although not the *origin* of the Court of King's Bench, was one of the *reasons* for its distinct and separate existence.

To return to the ordinary council, or household of the king. The council accompanied the king in his movements; and writs for the redress of grievances were made returnable—*i. e.*, the cause was to be heard—before the king wherever he should be in England.

Over the ordinary council, a great officer of state, the chief justiciary of all England, presided. His position in the realm was next in rank to that of the sovereign; and in the absence of the latter from the kingdom, the chief justiciary acted as regent. This great office was discontinued in the reign of Henry III.[5]

6. The chancellor was the secretary of the king,[6] and probably acted as the secretary of the council. From his office (the chancery) issued the writs which authorized suitors to bring their plaints before the king's courts. For, in the ordinary administration of justice, no action could be brought in the

[1] 1 Reeves's Hist. Eng. Law 80; see also 1 Foss's Judges of England 171, 189, 377.

[2] See 1 Reeves's Hist. Law, Finlason's notes 80, 89.

[3] Id.

[4] 1 Foss's Judges 171.

[5] Id., vol. i., p. 11.

[6] Id. 13.

king's court except such as concerned the king—the remedy between subject and subject being in the county and hundred courts. When, however, dissatisfaction came to be felt at the decisions of the local courts, the parties began to apply to the king's court, and obtained from the chancellor's department (the *officina brevium*), a writ applicable to their cases, and for which a fine was originally paid.[1] This payment having become an instrument of injustice, the Great Charter put a stop to it by providing that justice should no longer be denied or sold.

As the council still retained its general supreme authority, applications for relief were frequently made to that body when redress could not be otherwise obtained. In considering such applications, the advice of the chancellor would naturally be followed, as he was the king's secretary, was the keeper of his conscience (to which the petitions were addressed), and attended his person. The chancellor, moreover, was generally an ecclesiastic; and to churchmen, in those days, the learning of the civil law, to which the common law is so much indebted,[2] was principally confined. Besides, as from one branch of the chancellor's department issued the writs by which injuries were ordinarily redressed, he would naturally be the most proper person to determine whether the case presented was one which would fall within the forms already in use, or which would call for the exercise of the extraordinary jurisdiction still held in reserve. In some cases, therefore, the answer to petitioners was, that they should have a writ out of chancery—in other words, they were sent to the King's Bench, or Common Pleas; in others, the Court of Exchequer was pointed out as the tribunal in which the cause would properly be cognisable; while in still a third, the suitor would obtain relief (through the hands of the chancellor) directly from the council in the exercise of its extraordinary jurisdiction.[3]

7. Of course if the Courts of King's Bench, Common Pleas,

[1] Park's Hist. Chan. 25; Fleta, Lib. 2, cap. 13; 4 Inst. 78; Story's Eq. Jurisp., § 39. The Norman government would be likely to encourage such applications, in order to do away with the local courts, which were of Saxon origin.

[2] See Bracton and his Relation to the Roman Law, by Guterbock; Coxe's Translation.

[3] 1 Spence Eq. 330. See also Rex *v.* Hare, 1 Str. Rep. 151; Story's Eq. Jurisp., §§ 43, 49.

and Exchequer had been able and willing to redress every imaginable wrong, the reserve jurisdiction of the council never would have been called into play, and the Court of Chancery never would have grown into being. But the jurisdiction of each of the common-law courts was circumscribed. Certain precise and rigid forms of action existed, which were supposed to effectually carry out the great maxim of justice, *ubi jus ibi remedium*, but which in point of fact were not sufficiently comprehensive to do so. No common-law writ, for example, existed by which a defective instrument could be reformed, a fraudulent conveyance set aside, a mistake or accident effectually relieved against, or a beneficial interest in property be enforced as against the holder of a legal title. Hence many injuries must necessarily and actually did exist, for which the common-law courts furnished no appropriate redress; and therefore it was that, finding no relief in the King's Bench or Common Pleas, the suitor was compelled to throw himself upon the grace and compassion of the king and council.

Two or three circumstances, moreover, concurred to render this extraordinary jurisdiction liable to increase: first, the tendency of the common-law rules to hardness and rigidity by reason of the deference paid to precedents; secondly, the refusal of the common law to adopt that part of the Roman law which may be called equitable, as distinguished from that which is merely *stricti juris*;[1] and, finally, the desire to increase the dignity and importance of the office of chancellor, which grew to great proportions after the abolition of the office of Chief Justiciary, whereby an ambitious holder of the great seal would naturally be led to give redress by virtue of his extraordinary jurisdiction, rather than by directing a writ to be issued to bring the cause before the ordinary tribunals.

Another advantage, also, which the relief administered by the chancellor had over that obtained in the common-law courts, and which therefore tended to enlarge the exercise of the jurisdiction of the former, was this: A judgment at law was either simply for the plaintiff or simply for the defendant. There could be no qualifications or modifications of the judgment. But such a judgment does not always touch the true justice of

[1] 1 Spence Eq. 206, 346, 347.

the cause or put the parties in the position which they ought to occupy. While the plaintiff may be entitled, in a given case, to general relief, there may be some duty connected with the subject of litigation which he owes to the defendant, the performance of which, equally with the fiulfilment of *his* duty by the defendant, ought, in a perfect system of remedial law, to be exacted. This result was attained by the *decree* of a court of equity, which could be so framed and moulded, or the execution of which could be so controlled and suspended, that the relative duties and rights of the parties could be secured and enforced. This capacity of moulding a decree to suit the exact exigencies of a particular case is indeed one of the most striking advantages which procedure in chancery enjoys over that at common law, and must have been one of the elements which contributed in no small degree to the origin and growth of equitable jurisprudence.[1]

It was, most probably, to mitigate the rigors of the common-law courts, and at the same time to check the growing jurisdiction of the chancellor, that the famous statute of Westminster II. (13 Ed. I., c. 24) was passed, authorizing the issuing of writs in *consimili casu*. The inability or the unwillingness of the chancery clerks to avail themselves of the provisions of the statute to any considerable extent, prevented the common-law courts from extending their jurisdiction so as to cover the whole field of remedial justice, and still rendered it necessary for the suitor to apply elsewhere for extraordinary relief.[2] This extraordinary relief, whereby redress was given to those who were without remedy in the ordinary courts of the realm, was at first administered by the council upon petition addressed to them. Applications of this nature were, in fact, invocations upon that reserve force of justice which still resided in the *curia regis*, ready, when occasion required, to be called into play. Its exercise was of favor, not of right; and hence those matters in which it was displayed were called emphatically "matters to be granted as of grace."

When exactly it was that these applications came to be made

[1] See Story's Eq. Jurisp., § 27; Mitford's Pleading 3, 4.

[2] It is difficult to imagine, however, to what extent the jurisdiction of the chancellor would have gone if actions on the case had never been invented.

to, and the redress consequent thereupon came to be afforded by, the chancellor alone, is an historical question involved in some doubt. Certain it is, that as early as the reign of Edward I. an ordinance was issued for the purpose of relieving the king from the business of attending to petitions addressed directly to him, whereby it was provided that "all petitions touching the seal do come first before the chancellor;" and (providing, as it were, for an appeal to the king in great cases), "if the demands be so great and so much of grace that the chancellor and those others cannot do without the king, then they shall bring them before the king to know his will."[1]

A more direct recognition of the chancellor as the proper person by whom the extraordinary jurisdiction in *matters of grace* was to be administered, is contained in a writ of Edward III. addressed to the sheriffs of London, whereby suitors are specially enjoined to prosecute those affairs which are of grace before the chancellor, or the keeper of the privy seal.[2] In this reign the Court of Chancery ceased to follow the king.[3]

The natural consequences of these efforts on the part of the king to delegate this branch of judicial authority to the chancellor, would be that petitions for relief would come in time to be addressed directly to that officer. This result, in fact, shortly followed, and in the reign of Richard II. the practice of presenting a petition to the chancellor in the first instance was firmly established.[4]

8. The general ground for equitable relief was then, as it professes to be now, either the failure of the common-law courts to recognise a right, or their inability to enforce it.

[1] Haynes's Outlines of Equity 40; Story's Equity Jurisp., § 44.

[2] Haynes's Eq. 44. In the same reign the jurisdiction of the court in matters *other* than those of conscience became of great importance. It included pleas of *scire facias* for repeal of letters patent; of petition of right and *monstrans de droit;* traverses of offices, and some others. 1 Spence Eq. 336. This jurisdiction has been long supposed to have been at common law; but the recent publication of the Year Books of the reign of Edw. III. (ed. of Luke Owen Pike), shows this to be erroneous. The jurisdiction by *scire facias*, etc., was *not* at common law. Year Book 12 & 13 Edw. III., by Pike; Introduction, ci. *et seq.*, and cvi. *et seq.*

[3] 1 Spence Eq. 340.

[4] A small fragment of equity jurisdiction had, as has been already stated, drifted into the Court of Exchequer, where it remained until Stat. 5 Vic. c. 5, § 1. See *ante*, page 5, note 2.

Among the most frequent instances in which this general doctrine of equitable relief was applied were those in which petitions were addressed to the chancellor in cases of assault and trespass and a variety of outrages which were cognizable at common law, but for which "*the petitioner was unable to obtain redress owing to the position or powerful connections of his adversary.*"[1]

While, with the changed condition of society, the state of things which gave rise to and required this interference on the part of the chancellors has long ago passed away, and the jurisdiction itself has therefore fallen to the ground, it is still useful to recur to it, in order to show the theory upon which courts of equity have always acted from the earliest times, namely, the desire to supply deficiencies, no matter for what cause, in purely legal remedies.

Another class of cases in which the extraordinary interposition of the chancellor was called for was that of *trusts*, which was the term used when the legal title of property was held by one man, upon the confidence that another should have the right to its beneficial enjoyment. The origin and progress of trusts will be more particularly noticed hereafter. They were emphatically matters of conscience, and, therefore, fell strictly within the scope of the chancellor's extraordinary jurisdiction.

Besides these two classes of cases, many others existed in which the chancellor interfered.

The following instances, taken from the Chancery Calendar, may be cited as illustrative of the nature and extent of the extraordinary jurisdiction of the High Court of Chancery, during the period which extended from the termination of the reign of Edward III. to the reign of Henry VIII. Specific performance of a contract;[2] specific delivery of a ship and cargo wrongfully detained;[3] delivery for cancellation of documents obtained by

[1] See Prospectus of the Selden Society (founded in 1887 for the purpose of publishing ancient judicial MSS.); also, Goddard *v.* Ingepenne, 1 Chan. Cal. viii.; Thomas *v.* Wyse, Id. xiv.; Belle *v.* Savage, Id. xiv.; Royall *v.* Carter, Id. cxxx.

[2] Kymburley *v.* Goldsmith, Ch. Cal. xx.

[3] Bonodyn *v.* Arundell, Ch. Cal. xxxviii. This appears to have been by virtue of the former jurisdiction of the chancellor in admiralty, long since obsolete. See 1 Spence Eq. 703.

force;[1] relief against a forged power of attorney;[2] injunction to restrain a nuisance, said nuisance being a stoppage of a water-course;[3] for an injunction to stay proceedings at law;[4] to recover deeds and other evidence unjustly retained by the defendant in his possession;[5] for permission to go on with a suit at law from which the plaintiff had been restrained by an injunction;[6] because the plaintiff is disturbed in his manor by the defendant falsely claiming an annuity charged on the land;[7] to restrain a defendant from the use of witchcraft;[8] to assign dower to a poor widow;[9] because the defendant had through envy thrown down the plaintiff's house;[10] for relief against maintenance;[11] for quiet possession;[12] for discovery;[13] to set aside a conveyance obtained from the complainant when intoxicated;[14] for tithes;[15] to restrain harassing litigation;[16] to set aside a release obtained by a trick, and to enjoin the defendant from using it in an action at law.[17]

In Geffry Downham *v.* Heylyn ap Blethyn,[18] the defendant is alleged to have wrongfully obtained letters of presentation to a benefice. For this there was a legal remedy by *scire facias;* but the complainant seems to have thought himself justified in seeking equitable relief on the simple ground of failure or delay on the part of the common-law courts. "He hath sued," says the petition, "for the same cause from term to term at Nottingham, York, Winchester, and London, without success."

Broddesworth *v.* Coke,[19] which occurred in the reign of Edward IV., is a case which strikingly illustrates the progress which equitable jurisdiction was making. It was a bill setting forth an agreement by which the complainant was to convey

[1] Pickering *v.* Tongue, Chan. Cal. xliv.; Lord Berkley *v.* The Countess of Shrewsbury, Chan. Cal. lxxvi.; Brown *v.* Lord Say's Widow, Id. xlvii.

[2] Bief *v.* Dyer, Id. xi.

[3] The Burgesses of East Retford *v.* Thomas de Hercy, Id. ix. and x.

[4] Astel *v.* Causton, Id. cviii; Edyall *v.* Hunston, Id. cxiii; Peverell *v.* Huse, cxxii.

[5] Thomas Reed and Emma, his wife, *v.* The Prior of Launceston, Id. cxiv.

[6] Royall *v.* Garter, Id. cxxx.

[7] Hauley *v.* Tresilian, Id. iii., iv.

[8] Hoigges *v.* Harry, Id. xxiv.

[9] Danyell *v.* Belyngburgh, Id. xxx.

[10] Saxby *v.* Laurence, Id. xxxiii.

[11] Bell *v.* Rawe, Id. xxxvi.

[12] Cullyer *v.* Knyvett, Id. cxxxvii.

[13] Oxford *v.* Tyrell, Id. cxx.

[14] Stonehouse *v.* Stanshaw, Id. xxix.

[15] Arkenden *v.* Starkey, Id. xxxv.

[16] Freeman *v.* Poutrell, Id. xiii.

[17] Cobbethorn *v.* Williams, Id. ii.

[18] 1 Chan. Cal. ii.

[19] Id. lxvii.

certain lands, goods and *tailles*[1] to the defendant for the purpose of making a settlement with the complainant's creditors, and to secure advances to be made by the defendant; and that afterwards, upon the solicitation of the defendant, an absolute conveyance was executed, although it was intended that the transaction should be a mortgage. The prayer of the bill was for an account and reconveyance. The bill was dismissed, because, as to the lands, the evidence of the conditional character of the conveyance was insufficient, and as to the goods and *tailles* the complainant had a remedy at law.

In the above case it will be observed that many well-known equitable doctrines are recognised. In the first place an absolute conveyance is alleged to be a mortgage, and the *fraud* of the defendant in taking advantage of its absolute form, contrary to the true intention of the parties, and to his promise, is set forth as a ground for equitable relief. The defendant, moreover, is, in substance, alleged to be a *trustee* for the benefit of the complainant's creditors, and as such liable to answer before a court of equity. The relief sought is in accordance with the redress which a chancellor at the present day would give in such a case if it were properly proved, viz., an account showing how the trust assets had been administered, and a reconveyance of so much of the real estate as had not been employed for the purposes of the trust. The decree of the court is also in accordance with modern principles; for when actual *fraud* is alleged it cannot be presumed, but must be proved; whereas in in the present instance the complainant seems to have been unable to make out his case. And as to the goods and *tailles*, the bill appears to have been rightly dismissed, because for those the complainant had a complete common-law remedy.

9. From the above brief sketch of the rise of the jurisdiction of the English Court of Chancery three things are plain:

First. That, in the earliest times of the English constitution, there was felt a want of judicial relief outside and beyond that which was afforded by the common-law courts of the King's Bench, Common Pleas and Exchequer.

Second. That in consequence of this want, and for the purpose of supplying it, appeals were made to the king, as the

[1] Acquittances.

head and fountain of all justice, sometimes in parliament, sometimes in council, and sometimes in person; and that these applications, from the circumstance of having been referred from time to time to the chancellor, came at last to be presented to that official in the first instance; and

Third. That relief was afforded upon these petitions only in those cases wherein the common-law courts either could give no redress at all, or could give no adequate redress; and that while in some of these cases the necessity for the interposition of a chancellor has passed away, in others the principles then enforced have furnished the foundation upon which the modern jurisdiction of courts of equity has been built.

The *process* in equity was a subpœna, issued by the chancellor, in the name of the king, whereby the party was summoned to appear and answer the complaint of the plaintiff, and abide by the order of the court. It is commonly supposed to have been invented by John de Waltham, keeper of the seal under Richard II., and it is so stated in the complaint made by the commons to Henry V.; but this is doubtless an error, as an instance of the writ is found in 37 Edward III.; and de Waltham was not Master of Rolls until the fifth year of Richard II.[1]

The statement of the plaintiff's cause of action in equity is called the *bill.* To this bill the defendant (unless he could protect himself by a demurrer or a plea) was obliged to put in an *answer* under oath. The complainant in equity was therefore enabled to "search the conscience" of the defendant. But the defendant, on the other hand, enjoyed this advantage, that his answer, where no replication was filed by the complainant, was taken to be absolutely true in all its parts, whether the averments which it contained were simply in denial or were by way of confession and avoidance. And even when a replication was filed, the answer, when responsive to the bill, was also conclusive unless contradicted by two witnesses, or by one witness and cor-

[1] See 1 Spence Eq. 338, note *b.* "The subpœna was the former process to bring in a party to answer a charge before the king in council (see Hale Jurisp., H. L., pp. 7, 44), and was for some remedial purposes a usual process of the court of chancery as early as the reign of Edward III., when the jurisdiction of the court was beginning to show traces of a partial independence of that of the council. 1 Ro. Abr. 372." Winter *v.* Ludlow, Circuit Ct. U. S. (East. Dist. Pa.), Pamphlet Opinion of Cadwalader, J., pp. 26, 27.

roborating circumstances. This fact is important to remember in many cases, in considering the relief which a court of chancery affords. Relief may with propriety be granted, if based upon an admission of fact by the defendant himself, when, without such a foundation, it ought with equal propriety, to be refused. Thus it will be seen hereafter that equity will reform an instrument or rescind a contract executed or entered into under a mistake of fact, or because it does not correctly express the intention of the parties. But it does this only after the mistake has been admitted by the defendant, or so conclusively proved against his answer denying it, that there can be no doubt whatever of its existence. While the relief afforded in equity was therefore extraordinary, equally extraordinary precautions were taken to prevent that relief from being improperly granted.

If the plaintiff was not satisfied with the admissions in the answer, and could not upon those admissions obtain the relief which he sought, his proper course was to traverse the defendant's averments, and this was done by filing a replication. The issue or issues between the parties were in this way arrived at, and the next step was the production of the evidence.

The manner of taking evidence in equity is different from that which is pursued at law, although the rules of evidence are the same. At law the testimony is taken *vivâ voce*, and publicly at the trial of the cause; in equity, according to the ancient practice, the evidence was elicited by interrogatories and cross-interrogatories, and was taken privately before an officer of the court called an examiner.[1] The practice was for the party (plaintiff or defendant) to file written interrogatories, whereupon the opposite party was at liberty to file cross-interrogatories for the purpose of cross-examination. Upon these interrogatories and cross-interrogatories the witnesses were examined privately by an examiner—no one but the witness and the examiner being permitted to be present—and the answers reduced to writing. After the depositions had thus been taken, leave to inspect them, after a time fixed by rules of court, was given to the parties, and this was called passing publication. After publication was passed, no further witnesses could be examined without special leave of the court.

[1] See Adams's Eq. *365 *et seq.*

This method of taking testimony in chancery has been considerably modified in many of the States of the Union, and in England, a *vivâ voce* examination before the examiner, and, in some cases, before the court itself, being substituted for the examination through interrogatories. The testimony, however, is reduced to writing, and forms part of the record in the cause. The difference between the methods of taking testimony in chancery and at law is the result of the difference in the ends sought to be attained. At law evidence is the means whereby a jury determine the issues raised by the pleadings; in chancery it is the machinery by which the chancellor informs himself of the facts upon which to base his decree. The complainant in his bill is bound to set forth the facts which are supposed to entitle him to relief; and the defendant's answer must be fully responsive to these allegations. If the answer admits the statements in the bill, the facts necessary to found a decree then stand admitted on the pleadings. If the answer denies the averments of facts in the bill, it is, as already stated, conclusive in favor of the defendant unless contradicted by two witnesses, or by one witness and corroborating circumstances. Where, however, the testimony is conflicting, the chancellor is not obliged to decide the issue of fact, thus raised, himself, but may direct an issue to be framed and sent to a jury. But this course is only adopted to inform (as the phrase is) the conscience of the chancellor, and if he is not satisfied with the finding of the jury he may disregard it. And he is bound so to disregard it if the evidence is insufficient to warrant a jury in finding the fact.[1] It results from this that in Pennsylvania and other States, where common-law forms are used for the purpose of administering equitable relief, it is the duty of a judge, where, in his opinion, the facts proved do not make out a case in which a chancellor would make a decree, to give binding instructions to that effect to the jury.[2] It must also be understood that the court is not *bound* to send an issue to a jury. It is solely for the benefit of

[1] Baker *v.* Williamson, 4 Barr 469.

[2] See Todd *v.* Campbell, 8 Casey 252; McGinety *v.* McGinety, 13 P. F. Sm. 44; Church *v.* Ruland, 14 Id. 442; Robinson *v.* Buck, 21 Id. 391; Faust *v.* Haas, 23 Id. 300; Ballantine *v.* White, 27 Id. 27; Phillips *v.* Meily, 106 Pa. St. 544.

the chancellor, and if he can, to his own satisfaction, pass upon the evidence without the assistance of a jury trial he may do so.[1]

10. To return from this digression. The jurisdiction above described was not exercised without opposition. In the successive reigns of Richard II., Henry IV., Henry V., and Henry VI., petitions were from time to time presented by the Commons setting forth encroachments upon the common law, complaining that men were brought before the council in matters which were remedial at law, and (in two instances) inveighing against the use of the subpœna. The jurisdiction of the chancellor and the council was, however, upheld by the sovereign; and the obnoxious writ was not abolished.

In the reign of Henry VIII. a statute was passed, which threatened at first to remove a large portion of the jurisdiction of the chancellor by destroying a species of property which had hitherto been solely cognisable in his court, namely the *Use*.

By the celebrated Statute of Uses (27 Henry VIII., c. 10) this estate in the land (the use) which had hitherto been recognised solely in a court of equity, was clothed with the legal title, and thereby rendered a proper subject for the recognition of a common-law court. The nature of the use, and the effect of the statute will be explained hereafter. It will be sufficient to say, at present, that the threatened blow at the jurisdiction of chancery was averted by an ingenious construction of the statute, whereby these equitable estates were rescued from destruction, and their control still retained in the court where they had originated.

In the reign of James I. another attempt was made to interfere with the jurisdiction of the chancellor. An action was tried before Coke in which the plaintiff lost the verdict in consequence of one of his witnesses being artfully kept away. He then had recourse to chancery to compel the defendant to answer on his oath, which the latter refused to do, and was committed for contempt. Coke then had indictments preferred against the parties to the bill, their counsel and solicitors, for suing in another court after judgment obtained at law, which was alleged to be contrary to the statute of *præmunire*.

[1] Smith *v.* Carll, 5 J. C. R. 118; Van Alst *v.* Hunter, Id. 148.

The matter was referred to the king, whose decision was in favor of the lord chancellor.[1]

From that time to the present the jurisdiction of the Court of Chancery has been free from interference, and has expanded into a wise and comprehensive system of justice. This system has been perfected by the hands of many illustrious men who have sat upon the woolsack or at the Rolls—among whom are to be mentioned Nottingham,[2] Hardwicke, Eldon and Grant, St. Leonards, Westbury, Selborne and Jessel.

Courts of common law, in modern times, have afforded relief in many cases which formerly fell under the cognisance of chancery alone, but the latter tribunal has not, on that account, abandoned the jurisdiction which it had acquired, and the suitor has now, not unfrequently, two tribunals open from which he may obtain redress.

The choice between the two tribunals in England has been of late years, greatly affected in favor of the Court of Chancery, by reason of the vast improvements which have been introduced in the constitution of the equity courts and the practice therein. The jurisdiction formerly administered by the chancellor alone came, by various statutes, to be vested in eight judges, viz., the Lord High Chancellor, two Lords Justices of Appeal, the Master of the Rolls, three Vice-Chancellors, and the Chief Judge in Bankruptcy; and many improvements were introduced tending to the prompt and economical administration of justice.

11. The system, however, of two distinct sets of courts administering different and sometimes conflicting rules, has at last ceased to find favor in England. On the fifth of August, 1873, an Act of Parliament was passed under the title of the "Supreme Court of Judicature Act," whereby the constitution of the English courts was radically changed. By this act (which, it was declared, should come into operation on the second day of November, 1874) it was provided that the Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Court of Exchequer, the High Court of Admiralty, the Court of Pro-

[1] Earl of Oxford's Case, 1 Ch. Rep. 1; 2 Lead. Cas. Eq. 504 (601, 4th Eng. ed.)

[2] "The father of equity almost, I may say, in this court," by Sir R. Pepper Arden, M. R., in Brydges *v.* Brydges, 3 Ves. 127.

bate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy should be united and consolidated, and should constitute one Supreme Court of Judicature, to consist of two divisions under the name of "Her Majesty's High Court of Justice," and "Her Majesty's Court of Appeal." It was further provided that the judges of the High Court of Justice should not exceed twenty-one in number; and that the Court of Appeal was to consist of five *ex officio* judges, and so many ordinary judges (not exceeding nine at any one time) as might from time to time be appointed. The *ex officio* judges were declared to be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer.[1] The act further provided that if the plaintiff claims any equitable estate, or right, or relief upon any equitable ground, or equitable relief upon a legal right, the said courts and every judge thereof should give the same relief as ought to have been given by the Court of Chancery before the passing of the act; and that if a defendant claims any equitable estate or right, or relief upon any equitable ground, or alleges any ground of equitable defence, the said courts and every judge thereof should give the same effect to every estate, right, or ground of relief so claimed, and to every equitable defence so alleged, as the Court of Chancery ought to have given in proceedings in that court before the passing of the act. Other provisions also exist, whereby equitable titles and rights are directed to be recognised, and equitable remedies substantially applied.[2]

It will be observed that, by the provisions of this act, the principles of justice, as administered in the Court of Chancery, have been made to pervade the whole mass of English jurisprudence, and that, in fact, by the rules growing out of those principles, all questions of justice in England are hereafter to be determined.

[1] By Statute of 38 and 39 Vic. c. 77 (1875), the constitution of the Court of Appeal was changed, and that tribunal was made to consist of the five *ex officio* judges already named and as many ordinary judges, not exceeding three, as should be, from time to time, appointed. By the Act of 1876 (39 and 40 Vic. c. 59) three additional judges of appeal may be appointed, and an appeal lies from the Court of Appeal to the House of Lords. The positions of Lord Chief Justice of the Common Pleas and Lord Chief Baron of the Exchequer are now abolished.

[2] See Wilson's Judicature Acts, pp. 1 to 169; and 18 Am. Law Rev. 575.

It is plain, from the above sketch of the rise of the Court of Chancery, that the term "equity," as descriptive of an important body of English law, has, as stated above, an essentially technical signification, and that its precise and definite meaning when so used is clearly distinguishable from that which it bears in its ordinary acceptation. Thus, "equity" may be in one sense synonymous with natural right and justice; but neither Courts of Chancery nor courts of law profess to afford relief in *all* cases in which redress would be prescribed by rules of charity, generosity or benevolence, or by the dictates of a nice sense of honor, and yet the rules of benevolence and the principles of honor are included within the scope of the terms "right" and "justice," and may therefore fall within one meaning of the term "equity." On the other hand, courts of common law recognise "equity" in a certain sense. Thus, when the "equity" of a statute is spoken of, or a certain case is said to be within that "equity," or the like, the meaning intended to be conveyed is simply that a sound and fair interpretation of the law must be given—an interpretation based not upon its letter alone, but upon its spirit and true sense. This method of interpreting statutes is one of the fundamental rules for their construction, and obtains in all courts—in those of common law, just as much as in those of equity.

The meaning of the word "equity," then, as used in its technical sense in English jurisprudence, comes back to this, that it is simply a term descriptive of a certain field of jurisdiction exercised, in the English system, by certain courts, and of which the extent and boundaries are not marked by lines founded upon principle so much as by the features of the original constitution of the English scheme of remedial law and the accidents of its development.

12. It has been already stated that the principles of justice, as administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction, have been adopted in nearly all, it would not be too much to say in *all*, of the United States. While this is true, it must be remembered that the practical application of these principles through the machinery of the courts has varied very much throughout the Union, and has received many modifications at different periods.

13. The federal courts have equity powers within the scope of the jurisdiction conferred upon them by the constitution.[1]

By the Constitution of the United States[2] it is provided that the judicial power of the federal government shall extend to all cases at law or in *equity* arising under the constitution and laws of the United States, and treaties made or which shall be made under their authority. This jurisdiction, as explained in the judiciary act, is not to be exercised in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law;[3] but this enactment is declaratory merely of the existing law.[4] It has also been said that the practice of the English High Court of Chancery forms the basis of the equity practice of the courts of the United States.[5]

14. After the separation of the American colonies from the British Crown, the constitutions of many of the States provided for the establishment of courts of chancery, after the model of the High Court of Chancery in England.[6] Such was the case in New York, New Jersey, Maryland, Delaware, South Carolina, and also Michigan.

In other States, as in Pennsylvania, there were no separate courts of chancery, and the equity powers conferred upon the common-law courts were exceedingly limited. Changes were, however, made from time to time in most of the States. In 1840 the State convention which revised the Constitution of New York abolished the courts of chancery, and conferred upon the Supreme Court a general jurisdiction in law and equity;

[1] Neves *v.* Scott, 13 Howard 270; Boyle *v.* Turner, 6 Peters 658; Robinson *v.* Campbell, 3 Wheat. 323; Noonan *v.* Lee, 2 Black 509.

[2] Art. III., Sect 2.

[3] Act of 1789, § 16. 1 Stat. at Large 82. Revised Statutes, § 723, p. 137.

[4] Boyce *v.* Grundy, 3 Pet. 210; Oelrichs *v.* Spain, 15 Wall. 228; Grand Chute *v.* Winegar, Id. 376; Hunt *v.* Danforth, 2 Curt. 592. See Thompson *v.* R. R. Co., 6 Wall. 137; Kenton Furnace R. R. & Manuf. Co. *v.* McAlpin, 5 Fed. Rep. 740; Fonb. Eq. 12, Laussat's n.; Buzard *v.* Houston, 119 U. S. 352.

[5] Smith *v.* Burnham, 2 Sum. 612, 625.

[6] A court of chancery had existed for a short time in Pennsylvania between the years 1720 and 1739. See article by Law. Lewis, Jr., in Hist. Soc. Mag. for July 1881, where a case in Chester county, is cited in which a court sitting as a court of equity reversed its own judgment given as a court of law. See Rawle's Essay on Equity in Pennsylvania. Courts of chancery had also existed prior to the Revolution in most of the colonies. See Laussat's note to 1 Fonblanque's Equity 13, article in 18 Am. Law Rev. 226, and Story's Equity Jurisprudence, § 56.

while, on the other hand, in Pennsylvania enlarged equity powers were conferred upon the courts in obedience to the suggestions contained in the report of the committee to revise the civil code, made in 1835.

The example of New York, in abolishing the distinction between legal and equitable forms of action and substituting a general form of civil action in their place, has been followed by very many of the western States of the Union;[1] and even the State of South Carolina, so justly celebrated for the learning and ability of its chancellors, has given in its adherence to the new system, and has adopted a code whereby separate courts of equity are abolished, and all civil injuries are redressed by one form of action.[2]

But even in those States where this sweeping change has been effected, it has still been found necessary to make provisions for certain equitable remedies, the absence of which would inevitably result in a failure of justice in many cases. Thus, injunctions and writs of *ne exeat* are issued, specific performance enforced, and receivers appointed, upon applications not made according to the course and practice of chancery, but under common law or statutory forms;[3] and relief which falls under the *quia timet*

[1] "This system was introduced, even down to its details, into Ohio, in 1853; into Missouri in 1850; into California in 1851; into Minnesota in 1851; into Wisconsin in 1857; into Oregon, in law, in 1854; into Indiana, with a slight departure in detail, in 1852; into Kentucky, with a departure precluding equity cases from being united with law cases, in 1851. It was recommended in a code prepared by commissioners from the District of Columbia in 1857. It was introduced into Iowa, in spirit, with much departure from the letter, in 1851. It is the law also of Kansas, Nebraska, Utah and Washington Territories. Alabama in 1852, Massachusetts in 1852, Tennessee in 1858 (but now in Tennessee, see Constitution of 1870), Texas and Mississippi at a date unknown to us, also introduced reforms based more or less upon these *reports*, while Maryland, in 1856, introduced an act which is mainly a *literal copy* of the provisions of the English act of 1852." (Report of Commissioners on Civil Practice, Rev. Stats. of Iowa 446.)

[2] Rev. Stats. of 1873, p. 586.

[3] This is the case in California (Wood's Dig. 168, 933; Parker's Sup. § 9172; Sts. of 1885, p. 94); New York; Ohio (Code, § 3); South Carolina (Rev. Stats. of 1873, 586); Missouri (Wagner's Dig. 1872, pp. 999 and 1028); Wisconsin (Taylor's Statutes 1416); Kansas (Code, Chap. 80, Art. II., § 10); Minnesota (Chap. 66 of the Code, Title I., § 1); Indiana (Code, Part. II., Ch. I., Art. I). Even in Pennsylvania, where the doctrine of equitable relief under common-law forms is most firmly established, complete redress is sometimes only attainable by bill in chan-

jurisdiction of equity is afforded through the medium of a petition or complaint.[1]

15. In considering this subject, therefore, the States of the Union may be conveniently divided into three groups or classes.

The first embraces those States wherein distinct courts of chancery exist; and includes New Jersey, Maryland, Kentucky Delaware, Tennessee, Mississippi, and Alabama.[2]

cery. See Treftz *v.* King, 24 P. F. Sm. 350.

[1] Statutes of California, Parker's Supplement, § 9172.

[2] In New Jersey a court of chancery is created by Art. VI., Sec. I., of the Constitution; and Sec. IV. of the same article provides that "the Court of Chancery shall consist of a chancellor." In 1871 the office of Vice Ch. was created. See, also, stats. of 1881, pp. 119–20, and of 1882, p. 89.

In Maryland the Constitution provides for the appointment of a chancellor.

In Kentucky courts of chancery are established in certain districts. (1 Rev. Stats. of Kentucky 343.)

In Delaware the Constitution, by Article VI., §§ 2 and 5, provides that there shall be a chancellor of the State, and that he shall hold the Court of Chancery.

By the revised code, the Court of Chancery shall have full power to hear and decree all matters and causes in equity, and the proceedings shall be as heretofore, by bill, answer, and other proper pleadings; and the chancellor shall have power to issue subpœnas, and all other process to compel defendants to answer suits there, to award commissions for taking answers and examining witnesses, to grant injunctions for staying suits at law and to prevent waste, as there may be occasion, according to the course of chancery practice in England, with power to make orders and award process, and do all things necessary to bring cause to hearing, and to enforce obedience to decrees in equity by imprisonment of the body or sequestration of lands.

Provided, that the chancellor shall not have the power to determine any matter wherein sufficient remedy may be had by common law or statute, before any other court or jurisdiction of this State; but that where matters determinable at common law shall be brought before him in equity, he shall remit the parties to the common law; and when matters of fact, proper to be tried by a jury, shall arise in any cause depending in chancery, the chancellor shall order such facts to trial by issues at the bar of the Superior Court. (Title xiv., Chap. 95, § 1.) See, also, Stats. of 1883, pp. 571–2.

In Tennessee, by the Constitution of 1870, the judicial power of the state is vested in one supreme court, and in such circuit, chancery, and other inferior courts as the legislature shall from time to time ordain and establish. The chancery courts are held by the chancellor.

They have original exclusive jurisdiction of all cases of an equitable nature, where the debt or demand exceeds fifty dollars, unless otherwise provided by this code.

They have concurrent jurisdiction over the persons and estates of idiots, lunatics, and other persons of unsound mind; over the persons and estates of infants, and of the appointment and removal of guardians; for the abate-

The second class is composed of those States wherein chancery powers are exercised by judges of common-law courts, but according to the course and practice of chancery. These States are Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Virginia, West Virginia, North Carolina, Georgia, Illinois, Texas, Florida, Michigan, Iowa, Arkansas, and Oregon.[1]

ment and recovery of usury; in all proceedings for divorce; for partition of estates; for sales of estates by personal representatives, guardians, heirs, or tenants in common; for sales of land of decedents, at the instance of creditors, for the payment of debts; in arbitration and agreed cases: and, in some cases, in the appointment of administrators. (Thompson and Steger's Digest, §§ 4280, 4298, 4299, 4300, 4301, 4302, 4303, 4304.) See also Act of 1877, and Memphis Law Journal, vol. i., No. 1, Jan. 1878.

In Mississippi it is provided by the Constitution (Art. IV., § 16), that a separate superior court of chancery shall be established with full jurisdiction in all matters in equity; and by statute the superior court of chancery has jurisdiction over all matters, pleas, and plaints whatsoever belonging to or cognisable in a court of equity. (Howard and Hutchinson 505.)

In Alabama the powers and jurisdiction of courts of chancery extend:—

1. To all civil causes in which a plain and adequate remedy is not provided in other judicial tribunals.

2. To all cases founded on a gambling consideration, so far as to sustain a bill of discovery and grant relief.

3. To subject the equitable title or claim to real estate to the payment of debts.

4. To such other cases as may be provided for by law.

Chancellors may exercise the extraordinary jurisdiction granted to that office by the common law in cases of necessity, when adequate provision has not been made for its exercise by some other officer, or in other courts; and with the exceptions, limitations, and additions imposed by the laws of this State. (Code of Alabama, §§ 602, 603.)

By the Revised Code of 1876 Courts of Chancery have power to correct errors in settlements of decedents' estates, and in accounts of guardians and in sales of real estate of decedents (§§ 3837 to 3841, inclusive); they have jurisdiction in writs of *ne exeat* and attachment (§ 3842 *et seq.*); and in cases of injunctions and creditors' bills (§§ 3867 to 3881, §§ 3882 *et seq.*)

[1] In Maine the Supreme Judicial Court has jurisdiction as a court of equity in the following cases:—

1. For the redemption of estates mortgaged.

2. For relief against penalties and forfeitures, civil and criminal.

3. To compel the specific performance of written contracts.

4. For relief in cases of fraud, trusts, accident or mistake.

5. In cases of nuisance or waste.

6. In cases of partnership and part-owners.

7. The construction of wills and administration of trusts.

8. Discovery in the cases before named, and in cases where the power is specially given by statute.

Writs of injunction may be issued in cases of equity jurisdiction, and when specially authorized by statute.

The third class of States includes, it is believed, all those which have not been mentioned as falling within the other two

(Rev. Sts. 1857, pp. 468–9.) Also, Acts March 15th 1881, and 1883, Sts., p. 135.

In New Hampshire it is provided that the Supreme Court shall have the powers of a court of equity in cases cognisable in such court, and may hear and determine according to the course of equity, in cases of charitable uses, trusts, fraud, accident or mistake; of the affairs of copartners, joint tenants or owners, or tenants in common; of the redemption and foreclosure of mortgages; of the assignment of dower; of contribution; of waste and nuisance; of specific performance of contracts; of discovery, where discovery may be had according to the course of proceedings in equity; and in all other cases where there is not a plain, adequate, and complete remedy at law, and such remedy may be had by proceedings according to the course of equity; and may grant writs of injunction whenever the same are necessary to prevent fraud or injustice. (Sec. 1.)

When goods or chattels are unlawfully withheld from the owner, proceedings in equity may be had for a discovery, for a restoration of the property, and for such other relief as the nature of the case and justice may require. (Sec. 2.)

When any estate, property, interest, right, or credit, legal or equitable, of a debtor against whom execution has been issued and returned unsatisfied, is alleged to be so holden that it cannot be reached to be taken on execution by levy or by suit on the judgment, that it has been conveyed by him in fraud of his creditors, or is held by others for his use, proceedings in equity may be had for a discovery and for relief; and the court shall make proper decrees and orders and issue proper process to compel a discovery, to prevent the transfer of such estate, property, interest, right or credit, and to make application of so much thereof as in justice ought to be so applied in satisfaction of the debt. (Sec. 3.)

The provisions of the preceding section shall not apply to property exempt by statute, or to trust property where the trust has been created by a party other than the debtor, and the application would be inconsistent with the trust. (Sec. 4, Gen. Stats. 1867, 388.)

In Vermont (Stats. of 1862) each judge of the Supreme Court is a chancellor throughout the State, and has and may exercise all the jurisdiction vested in or incident to a court of chancery.

In Massachusetts the Supreme Judicial Court has original and exclusive jurisdiction of every original process, whether by bill, writ, petition or otherwise, in which relief in equity is prayed for, except when a different provision is made; and may issue all general and special writs and processes required in proceedings in equity to courts of inferior jurisdiction, corporations, and individuals, when necessary to secure justice and equity.

The court may hear and determine in equity all cases where the parties have not a plain, adequate, and complete remedy at the common law, that is to say—

Suits to redeem or foreclose mortgages; trusts; specific performance of written contracts; suits to compel the redelivery of chattels withheld in such a manner that they cannot be replevied, contribution and other cases of adjustment; suits between copartners, joint-tenants, and tenants in common, with authority to appoint receivers, and between joint trustees, co-executors, and

classes. In these States the distinction between actions at law and suits in equity has been abolished; but, as has been already

co-administrators; waste and nuisance; accounts which cannot conveniently be adjusted at law; creditors' bills; fraud and conveyances, in the nature of mortgages; accident and mistake; discovery; and full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate, and complete remedy at law. (Gen. Sts. pp. 558–9.) See also Stats. 1881, p. 427; 1883, p. 510; and 1884, pp. 266, 344.

In Rhode Island the Supreme Court has the powers of a court of equity. (Rev. Stats. of 1872, 27, 404.)

In Connecticut the Supreme and Superior Courts have jurisdiction in equity. They have power to proceed according to the rules, usages, and practice of chancery; and shall take cognisance only of such matters in which adequate relief cannot be had in the ordinary course of law. Special provisions also exist upon the subject of injunction, mortgages, account, partnership and partition. (General Stats., Revision of 1875, pp. 40, 57, 413, 414, 447, 477 to 483.)

By the Constitution of Pennsylvania (Art. V., § VI.), the Supreme Court and Courts of Common Pleas, besides the powers heretofore usually exercised by them, have the power of a court of chancery so far as relates to the perpetuating of testimony, the obtaining of evidence from places not within the State, and the care of the persons and estates of those who are *non compos mentis*; and the legislature is directed to vest in the said courts such other powers to grant relief in equity as shall be found necessary * * * or vest them in other courts.

By the act of 1836 and subsequent statutes, equitable jurisdiction was conferred in the following cases—besides those mentioned in the Constitution, viz.:—

The control, removal and discharge of trustees, and the appointment of trustees and the settlement of their accounts.

The supervision and control of all corporations other than those of a municipal character, and unincorporated societies or associations and partnerships.

The care of trust moneys and property, and other moneys and property made liable to the control of said courts.

The supervision and control of partnerships and corporations other than municipal corporations.

Discovery; interpleader; injunction to restrain acts contrary to law and prejudicial to the interests of the community and rights of individuals.

Specific relief when recovery in damages is inadequate; fraud (actual or constructive); accident and mistake; account; dower; partition and disputed boundaries; mines; apportionment of wharfage and dockage; plank-roads: 1 Br. Purd. 589. Impurities in gas and water: P. L. 1881, 112; disposition of property of unincorporated societies: P. L. 1883, p. 133. The Constitution adopted in Dec. 1873, made no change in this respect, except that the S. C. has now no *original* jurisdiction save in cases of injunction where a corporation is a party defendant.

In Virginia the County and Circuit Courts have jurisdiction in law and equity. The proceedings on the equity side are according to the course and practice of chancery; and various equitable remedies are expressly provided for by statute. (See Code of 1860.) In West Virginia similar provisions exist.

In North Carolina it is provided that each superior court of law shall also be a court of equity of the same county,

stated, certain equitable remedies are still administered under the statutory form of the civil action.

Whatever modifications have been introduced by statute into

and possess all the powers and authorities, within the same, that the Court of Chancery which was formerly held in this State under the colonial government used and exercised, and that are properly and rightfully incident to such a court. (Rev. Code 187.)

By the Code of Georgia, of 1873, equity jurisdiction is established and allowed for the protection and relief of parties where from any peculiar circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong, or relieving for injuries done. Many equitable maxims (see Chap. III. *post*) are made the subject of express enactment. Special provisions also exist in reference to Discovery, Perpetuation of Testimony, Accident and Mistake, Accounts and Set-off; Administration of Assets, Charities, Election, Execution of Powers, Fraud, Partition, Specific Performance, Trust and Trustee, Injunction, *Ne Exeat*, Bills *Quia Timet*, of Peace and of Interpleader. See Code of 1872, Title ix.

See also upon the subject of the chancery powers of the courts in this State, Williams *v.* McIntyre, 8 Georgia 34; Walker *v.* Morris, 14 Id. 323; Rutherford *v.* Jones, Id. 521.

In Texas there are no separate equity courts. General jurisdiction at law and in equity is conferred upon certain courts. The proceedings are by petition; and parties may be compelled to answer interrogatories. (Oldham's Dig. Title "District Courts.")

In Illinois the circuit courts have jurisdiction as courts of chancery. (Statutes, pp. 69, 70.) Elaborate regulations for practice in these courts are made by statute. See Revised Code, chap. 22, pp. 184 *et seq.* (ed. 1877.)

In Florida the general assembly has power to establish and organize a separate court or courts of original equity jurisdiction, but until such court or courts are established and organized the circuit courts are to exercise such jurisdiction. (Const., Art. 5, § 8.)

By statute it is provided that no writ of injunction or *ne exeat* shall be granted until a bill be filed praying for such writ, except in the special cases and for the special causes in which such writs are authorized by the practice of the courts of the United States exercising equity jurisdiction. (Stat. of 1828, Thompson's Digest 453.)

The issuing of writs of injunction to stay proceedings at law, and of writs of *ne exeat*, is also made the subject of regulation. See, also, Stats. 1881, p. 63.

In Michigan the office of chancellor is now abolished, and the several circuit courts of the State are constituted courts of chancery. Their powers and jurisdiction in and for the respective counties are co-extensive with the powers and jurisdiction of the Court of Chancery in England, with the exceptions, additions and limitations created and imposed by the Constitution and laws of this State. (Comp. Laws, pp. 1006, 1009.) Stats. 1881, pp. 85, 255, 384 *et seq.*; 393; of 1882, p. 23; 1883, p. 57, 58, 153; 1885, p. 169, 207, 209–10.

In Iowa it is provided that the judicial power shall be vested in a supreme court, district court, and such other courts, inferior to the Supreme Court, as the general assembly may from time to time establish.

The chancery jurisdiction of the Supreme Court is appellate only.

The district courts are courts of law and equity. (Constitution, Art. V.)

The proceedings in a civil action may

the *forms* of relief, the system of justice which is administered in courts of equity must, of necessity, enter into the laws of every civilized state whose institutions are derived, directly or indirectly, from England; and no State in the Union, however widely it may depart from the practice of the English High Court of Chancery, can discard the principles upon which its extraordinary jurisdiction is founded.

CHAPTER II.

GENERAL OUTLINE OF EQUITABLE JURISDICTION.

16. Three great divisions of equity.
17. Equitable titles; example.
18. Equitable rights; example.
19. Equitable remedies; example.
20. Subjects of equitable jurisdiction: Trusts.
21. Mortgages.
22. Assignments.
23. Accident and Mistake.
24. Fraud.
25. Notice; Estoppel; Election.
26. Conversion.
27. Adjustment; Set-off; Contribution; Subrogation; Exoneration; Marshalling.
28. Equitable liens.
29. Specific performance.
30. Injunctions.
31. Re-execution; Reformation; Cancellation.
32. Account; Dower; Partition; Confusion of boundaries; Rent.
33. Partnership bills; Creditors' bills; Administration suits.
34. Infants, idiots and lunatics.
35. Discovery; Commissions to examine witnesses abroad; Perpetuation of testimony; Examinations *de bene esse*.
36. Bills *quia timet;* Receivers; Writs of *ne exeat;* Writs of *supplicavit*.

16. It is trusted that the sketch already given of the rise of the High Court of Chancery in England, and of the reasons for

be of two kinds; first, ordinary; second, equitable. The plaintiff may prosecute his action by equitable proceedings in all cases, where courts of equity, before the adoption of this code, had jurisdiction, and *must* do so in all cases where such jurisdiction was exclusive. (Code of 1860, §§ 2610, 2611.) See also Code (ed. 1873) 429 *et seq.*

In Arkansas the circuit courts have jurisdiction in matters of equity. (Constitution of 1864, Art. VII., § 6.) By an Act of 1885, separate courts of chancery are established in certain counties.

In Oregon the enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law.

The courts are a supreme, circuit and county courts, having general jurisdiction. (Code, § 376; Gen. Laws 243.)

its assuming the exercise of its extraordinary jurisdiction, have made it apparent that the subjects or heads of chancery jurisdiction are susceptible of division into three general classes: the first embracing those cases in which common-law courts do not recognise a *title;* the second, those in which the common-law courts do not recognise a *right;* and the third, those cases in which the common-law courts cannot *enforce* a right, or cannot *enforce it so as to do complete and exact justice.*[1]

It will be convenient to give an illustration of each of these general subdivisions of equity.

17. Equity recognises titles which were entirely ignored at common law.

Thus, for example, it is well known that a *chose in action* could not be assigned at common law. The assignee had no standing whatever in a common-law court; the assignment was null: he simply took no title whatever. In equity, however, whenever the assignment was founded upon a valuable consideration, and when it would therefore be unfair to allow a person to pay value without getting a substantial equivalent, an entirely new title was created, distinct from and independent of the legal title, which still remained in existence, but was held by the assignor solely for the benefit of the assignee. The method of asserting this equitable title was by allowing the assignee to use the name of the assignor in an action at law to recover the *chose,* and by restraining the latter from any interference in this suit. If the assignor refused to allow his name to be used, or any other reason existed which called for the direct interposition of chancery, the assignee was entitled to file a bill in equity, and his title to the *chose* was immediately recognised and enforced.

Here, then, is a case in which equity creates and enforces a title not known at law.

18. Again: the enjoyment, devolution, and transmission of legal titles are sometimes controlled by equitable doctrines, so that the rights of parties thereto may be very different in courts of equity from those to which a court of law would give effect. For instance, a guardian purchases property of his ward the day after the latter attains his majority. Here is a transaction by which the legal title to the property passes, and after which the

[1] See Spence Eq., Part II., Book III., Chap. I.

rights of the parties, *at law*, are fixed. But equity views such a bargain with a jealous eye; and in fact, has laid down the imperative rule that it cannot stand if the ward within a reasonable time chooses to disaffirm it. In equity, therefore, the ward may obtain a restitution of the property (upon the return of the consideration), not, indeed, because in chancery any new title is created, but because by the application of an equitable doctrine, the legal title is taken away from the person who at law would be entitled to hold it, and restored to him who in good conscience should be the rightful owner.

19. Of the third general class of cases in which equity affords relief—those, namely, in which a court of law recognises a right but cannot enforce it—in other words, those cases which fall under the head of equitable remedies—the doctrine of specific performance of contracts may be taken as an illustration. At law, if A. sells B. a piece of real estate, the legal title remains in the former until a deed is executed and delivered; and if he refuses to complete the sale, no power at common law can compel him to convey. B.'s right at common law (supposing the contract to be executed in such a way as to be binding) is simply a right of action on the contract by which damages may be recovered. Now, even if the case should happen to be one in which B. may recover damages in a common-law action for the loss of his bargain,[1] it is obvious that his legal remedy is nevertheless wholly inadequate, and affords no substantial redress. He has a right to the property; he has a right which the law recognises, because if the property is destroyed, the loss falls on him; but the common law is powerless to give him the thing itself for which he has bargained; it can only give him damages.

But in equity he has complete relief. Upon a bill being filed, and a proper case made out, the complainant is entitled to a decree that the defendant do convey to him the property in question on or before a certain day; and if the defendant disobeys the decree, his compliance therewith is enforced by an attachment—in other words, he is committed to prison until he executes the deed.

[1] For a discussion of the recent authorities upon this interesting point, see 1 Sug. V. & P. 542 (8th Am. ed. by Perkins.) See also Bowser *v.* Cessna, 12 P. F. Sm. 148; Thompson *v.* Shepler, 22 Id. 160.

It will be observed, therefore, that the general field of the jurisdiction of courts of chancery is susceptible of three great divisions, viz., I. Equitable Titles; II. Equitable Rights, or Equities; and III. Equitable Remedies.

It will be convenient, however, not only to point out the above general subdivisions, but to give also a brief summary, or, as it were, catalogue of the subjects of equitable jurisdiction.

20. The first and perhaps the most important of these subjects is that of Trusts.

A Trust is the beneficial title or ownership of property of which the legal title is in another. The person in whom the legal title is vested is called the trustee, and the person for whose benefit the trust exists is called the *cestui que trust.* So far as the duties of the trustee are concerned, trusts may be divided into active or special, and passive or simple trusts.[1] An active trust is one in which the trustee has some active duties to perform, such as to collect the rents and profits of an estate, and pay the net income to a married woman for her separate use; or to pay debts or legacies, or the like. A passive trust is one in which the trustee is the mere holder of the legal title, which he is compelled to convey to the *cestui que trust* whenever he is called upon to do so. Trusts are also either executed or executory. An executed trust is one in which the estates and interests in the subject-matter of the trust are completely limited and defined by the instrument creating the trust, and require no further instruments to complete them. An executory trust is where the instrument creating the trust is intended to be provisional only, and further conveyances are contemplated in accordance with the terms of the trust, and whereby the same may be effectually carried out.[2]

Trusts may also take their name from the purposes for which they are created, *e. g.*, trusts may be either private or public trusts; they may be either trusts lawful or trusts unlawful.

The division of trusts, however, which is generally made for the purposes of a treatise on equity, is one based upon the manner in which trusts are created, and it is plain that this may be in one of two ways—either, first, by act of party, or,

[1] Lewin 21.

[2] Lewin 144.

second, by act of law. Trusts, as respects their mode of creation, are therefore divisible into express and implied trusts; and implied trusts are in this treatise again subdivided into resulting trusts and constructive trusts.

Express trusts, as a general rule, may be created by parol; and no particular form of language is necessary, but any words which sufficiently indicate intention will be competent to create a trust. Trusts in respect to real estate are, however, required by the statute of frauds in England to be in writing; and similar statutes have been passed in nearly all of the United States.

Express trusts may be created either by direct fiduciary expressions, or by precatory words, or by words indicating that a power is to be used in trust.

Of trusts by direct fiduciary expressions nothing need, at present, be said in explanation.

Trusts by precatory words arise where a testator has not used words of direct command, but expressions of entreaty or recommendation, which are construed, for the purpose of effectuating intention, to be equivalent to imperative words.

Powers in trust are those powers, the exercise of which is not left to the discretion of the donee of the power, but which are considered as obligatory because they are to be exercised for the benefit of some third persons, and the duty of the donee of the power is therefore looked upon as a trust.

A resulting trust may arise in several ways, one of the most usual being where a purchase is made and the money paid by one man, and the title to the property is taken in the name of another. Here the law implies a trust, on the part of the latter, to hold the legal title for the benefit of the actual purchaser. So, too, where there is a gift by will to trustees for a particular purpose which fails, a trust results for the benefit of the heir at law or next of kin, according as the gift is of real or personal estate. The other cases of resulting trusts are those in which the trustee or other fiduciary buys property in his own name but with trust funds—in which case a trust will result for the benefit of the party whose funds are thus employed; and where a conveyance is made without any consideration, and it appears from circumstances that the grantee is not intended to take

beneficially, the rule then being that a trust results to the grantor.

A constructive trust may arise either out of fraud or in the absence of fraud. The most numerous cases of constructive trusts are those which spring from actual or presumptive fraud, and will be treated of under that head of equitable relief. A trust which arises from actual fraud is where (for example) a conveyance is obtained by direct deceit or misrepresentation. In such a case, equity affords redress by treating the wrongdoer as a trustee of the legal title of the property, for the benefit of the injured party, and directing a conveyance.

Presumptive fraud is where the law supposes that a transaction is fraudulent from the mere circumstance of the relations of the parties or the nature of the transaction, without any proof of actual deceit. Thus a bargain between a solicitor and client, a guardian and ward, a parent and child, a trustee and *cestui que trust*, or any other two persons standing in a confidential or *quasi* confidential relation, touching the subject-matter as to which the fiduciary relation exists, will be set aside at the option of the client, ward, child, or *cestui que trust*, as the case may be, unless the entire fairness of the transaction is abundantly proved. In this case, also, equity uses the theory of a trust for the purpose of effecting relief, in the same way as in cases of actual fraud.

A constructive trust, in the absence of fraud, may arise in several ways. Thus where a person acquires trust property without notice of the trust, but without having paid any value for it, he is not entitled to hold it discharged of the trust, but is looked upon in equity in the same light as a trustee, and is compelled to convey or otherwise dispose of the property accordingly. Another common instance of constructive trusts occurs in the renewal of leases; the rule being that if a trustee or executor, or even an executor *de son tort*, renew a lease in his own name, he will be deemed, in equity, a trustee for those interested in the original term.[1]

Another instance of a constructive trust in the absence of fraud is where a binding contract is made for the sale of real

[1] Lewin 217.

estate. In such a case, before the conveyance is executed, equity treats the vendor as a trustee of the land for the benefit of the vendee, and the latter as a trustee of the purchase-money for the benefit of the former. This doctrine is properly a branch of the subject of specific performance, and will be treated of under that head.

Having noticed the manner in which trusts are called into being, the next thing to be considered is "for what purposes are trusts usually created?" One of the most frequent and important of these purposes is to secure the property of married women; and this is effected by a gift to her sole and separate use. The separate use is a creature of equity; and is, perhaps, one of the best illustrations which could be given of the manner in which chancery courts, in certain cases, depart from the rules of common law. By the latter, a husband was entitled to all his wife's personalty in possession; to her *choses in action*, if he chose to reduce them into possession, or (as the rule is sometimes held) convert them to his use; and to a life estate in her realty. Equity, for the benefit of married women, allows gifts to be made to her by which her husband may be deprived of all these rights.

By conveying the estate to a trustee for the sole and separate use of a married woman, the *corpus* of the estate may be secured from any control of the husband, or from any liability to his debts, and the income paid directly to the wife. In England, and in some of the States of the Union, the wife has the same control over the separate estate (unless expressly restrained) as she would have if unmarried. In other States, she has only those powers which are conferred upon her by the instrument creating the estate.

The descent and distribution of separate use estates is the same as that of legal estates, except (of course) where differences are made by statute; and this rule indeed applies to all equitable estates, with the qualification that a woman is not dowable out of an equitable estate, although a man is entitled to his tenancy by the curtesy.

Connected with the subject of a married woman's equitable separate estate, is what is known as her equity to a settlement. This arises when a husband is obliged to go into a court of chancery for the purpose of reducing his wife's *choses* in action

to possession; or getting in any property that belongs to her. In such a case, the court refuses to aid the husband, except upon the terms of making a reasonable settlement upon the wife out of the property.

Gifts directly from the husband to the wife will also require notice under this head—as these gifts are void at law, and are upheld by virtue of equitable doctrines only.

Another important class of trusts are those for charitable purposes. These trusts are of a public nature, and differ from other trusts in several important particulars, among which two may be especially mentioned, viz., first, that charitable trusts do not require such a degree of certainty in the description of the beneficiaries as is requisite in an ordinary private trust; and, secondly, such trusts are not subject to the ordinary rules in relation to perpetuities. They depend very much in England, and in many of the United States, upon a statute passed in the reign of Queen Elizabeth, and constitute an important branch of equitable jurisdiction.

A court of chancery always exercises a supervision and control over trustees in the administration of their trusts. Any trustee is entitled to come into court for advice or assistance, or for the purpose (in a proper case) of being discharged; and any *cestui que trust* may invoke the interposition of the chancellor in cases of breach or abuse of the trust, or to have a vacancy in the office of trustee supplied.

The duties of trustees of course vary with the character of the trust and the nature of the subject-matter thereof. They may be said to be summed up in the duty faithfully to attend to the interests of the *cestui que trust*, and to abstain from making any use of the trust property for the trustee's own benefit.

Trustees, according to the English rule, are not entitled to compensation; but in this country the law is generally otherwise.

21. The case of Mortgages is the next head of jurisdiction in which an independent title is created and recognised in equity. A mortgage is a conveyance of real estate to secure a debt due by the mortgagor (the party who executes the conveyance) to the mortgagee (the party to whom the conveyance is made), coupled with a clause of defeasance by which upon the payment

of the debt on a day specified, the title to the property revests in the mortgagor. At law, if the day for payment passed by, the estate became absolute in the mortgagee, and the mortgagor's title was wholly gone. Equity, however, stepped in to his relief, and recognised a title still existing in the mortgagor, whereby he was allowed a right to redeem the mortgaged property on any subsequent day, by paying the debt with interest. This is called the mortgagor's "equity of redemption;" a right which is now inseparably connected with every mortgage.

On the other hand, equity gives a remedy, unknown to the common law, by allowing the mortgagee to *foreclose* (as it is called) this equity of redemption. In a foreclosure suit a decree is entered whereby another day is fixed for redemption; and if the mortgagor does not take advantage of the new opportunity thus afforded him, his right is for ever gone. The existence of the relation between a mortgagor and mortgagee (which relation is a peculiar one) produces certain consequences which will be noticed in the proper place.

22. The last equitable title is that which grows out of the assignment of *choses in action*, which species of property could not be transferred at law, but assignments of which are upheld in equity when they are made for a valuable consideration, and do not contravene any rule of public policy. In this case, as in that of trusts, equity creates a new title, co-existent with the legal title, and which (as has been already explained) will be enforced either by compelling the assignor to allow the assignee to use his name in an action at law, or by affording direct relief by bill in equity when any difficulty in bringing the legal action exists. By such assignments not only *choses in action*, but expectancies, contingent interests, and property to be created or acquired in the future may be transferred, and the title thus acquired will be recognised and protected by chancery courts.

23. Besides creating new titles, independent of legal ownership, equity also affords relief by setting up and enforcing equitable rights in regard to existing legal titles. This is done by virtue of certain doctrines by which common-law rights of enjoyment are modified or controlled. The first of these equities which will be noticed, are those of Accident and Mistake.

The relief afforded under the head of Accident springs from

the ancient jurisdiction of the court of chancery in what were known as "cases of extremity." It is now exercised principally in three cases: first, in that of lost instruments; secondly, in that of defective execution of powers; and, thirdly, in the case of penalties and forfeitures.

The jurisdiction of equity in cases of Mistake grew out of the great credit which common-law courts gave to a sealed instrument, and to the inability of these courts to afford an adequate redress in all cases of mistake.

Mistakes are of two kinds, mistakes of law and mistakes of fact. As a general rule, mistakes of law cannot be relieved against even in equity; although the tendency is to grant relief in all cases in which there exists any element of misrepresentation or even surprise; but for mistakes of fact, if mutual, material and not induced by negligence, relief may be had upon a proper case being shown. Such relief is often administered when powers are defectively executed through mistake.

24. The next equitable rights which will require notice are those which grow out of Fraud.

Fraud, indeed, vitiates transactions at law as well as in equity; but the jurisdiction of chancery is superior to that at common law, for two reasons—first, because in equity fraud has a more extensive signification than at law; and, secondly, because the relief afforded is much more complete.

It is, however, frequently difficult to say with precision what cases fall under the head of fraud as a distinct ground for relief in equity, because fraud so often exists in connection with other reasons for the assistance of a chancellor that it is hard to determine on what particular basis the relief is afforded. Thus, as we have seen, certain kinds of constructive trusts are based upon fraud; in other words, equity considers that, in consequence of certain fraudulent conduct, the relationship of trustee and *cestui que trust* is called into being, and the rights of the parties are determined upon the footing of that relation. The ground of relief, therefore, is both fraud and trust. So, also, certain equitable remedies are founded upon the idea of doing complete justice in cases of fraud. Thus, if a person has been fraudulently induced to sign a bond, equity will not compel the obligor to wait until an action at law is brought thereon, and then take defence, but will afford relief, not only complete but

also immediate, by directing the fraudulent instrument to be delivered up and cancelled. It will be seen, therefore, that this subject of fraud not only furnishes ground for relief at law, but also runs into at least two other distinct heads of equity.

There are, however, certain classes of cases in which fraud alone gives jurisdiction, and it has, therefore, been ordinarily considered as one of the special heads of the jurisdiction of a court of chancery, and will accordingly be so treated in this work.

Another and very important reason for so treating it, is the fact that in many States of the Union it is made one of the cases in which equity powers are granted to the courts. In those States, therefore, where these powers are not general, but limited, it is necessarily of no little consequence to determine exactly what is meant by the language of the statute, and therefore to know what is the nature and what the bounds of chancery jurisdiction on this subject.

Fraud has been divided, according to the classification of Lord Hardwicke in Chesterfield *v.* Jansen,[1] for the purpose of convenient consideration, into four classes, viz., 1. Fraud arising from facts and circumstances of imposition; 2. Fraud arising from the intrinsic matter of the bargain itself; 3. Fraud presumed from the circumstances and condition of the parties contracting; 4. Fraud affecting third persons not parties to the transaction. This classification has been adopted in the present treatise.

25. Growing out of the general subject of fraud is that of Notice, which embraces also the subordinate equities of *bonâ fide* purchasers, and the application of purchase-money. Notice is a doctrine which is recognised for the purpose of protecting equitable titles. At common law the purchaser of a legal title acquired the absolute property in the subject. In equity, however, if he has notice of an equitable title, he will be considered as a trustee of the legal title for the benefit of the equitable owner. On the other hand, want of notice may be a protection to a purchaser against the assertion of an equitable right. In such a case he sets up the plea of being a *bonâ fide* purchaser for a valuable consideration without notice; and is thereupon entitled to the favorable consideration of a court of chancery.

[1] 1 Atk. 301; 2 Ves. 125; 1 Lead. Cas. Eq. *341 (773, 4th Am. ed.).

Notice may be of two kinds: first, *actual;* and second, *constructive;* and actual notice may again be divided into *direct* or positive notice, and *indirect*, implied, or presumptive notice. The doctrine of *lis pendens* is akin to that of notice, and will be treated of under the same head. It is (stated briefly) a principle by which a suit in chancery, duly prosecuted in good faith and followed by a decree, is held to be constructive notice, to every person who acquires from a defendant *pendente lite* an interest in the subject-matter of the litigation, of the legal and equitable rights of the plaintiff, as charged in the bill and established by the decree.

Another equity springs, also, from the general head of Fraud, but requires a separate consideration, that, namely, of Estoppel. Estoppel is the agency of the law by which evidence to controvert the truth of certain indisputable admissions is excluded.[1] Estoppels, in general, may arise either by matter of record, of deed, or *in pais*. Equitable estoppels fall under the last class, and they grow out of representations which, after they are made, cannot be denied, but must be adhered to by the party making them. The representation which will operate as an estoppel must be one that is either a suggestion of falsehood, or a concealment of truth when there is a duty to speak; it is always external to the transaction; and it may take place either in a transaction effected between the party alleging the estoppel and the party estopped, or in one between the party alleging the estoppel and some third party.

Somewhat akin to the doctrine of estoppel, and therefore properly to be considered in immediate juxtaposition, is the doctrine of Election, by which a party is compelled to choose between inconsistent benefits, and is precluded (after having once exercised his choice) from insisting upon rights which he would otherwise be perfectly free to assert. Thus, if a testator gives money or land to A., and, by the same will, gives something of A.'s to B., here A. must elect either to give effect to the will by allowing B. to have the property which the testator intended should go to him, or to assert his right to his own property, in which case he must make good its value (out of the gift to himself) to the

[1] Bigelow on Estoppel, page 345 *et seq.* (2d edition).

disappointed beneficiary. An election may be either express or implied. In order that the doctrine may be called into play it is necessary that the testator should affect to dispose of property which is not his own, and should also make a valid gift of his own property; and it is further requisite that the twofold gift should be made by the same instrument. In order to make a valid election the party electing must have adequate information in regard to the values of the two pieces of property between which he is to choose; and he is entitled to the assistance of the court for the purpose of determining the values. As a general rule, an election can be made only by persons *sui juris*, but a court of equity will sometimes elect for the benefit of a *feme covert* or an infant.

26. The next equity which will be considered is that of Conversion, by which is meant a change of property from real into personal, or from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity. This result may happen under a will, or by an instrument *inter vivos*. A devise of land to trustees, with imperative directions to sell and divide the proceeds between certain persons would be an illustration of a conversion under a will; a binding contract for the sale of realty would be an example of the application of the same doctrine to a transaction *inter vivos*. In both cases the land would, in the eye of equity, be considered, for certain purposes of devolution, turned into money from the date of the death of the testator in the one case, and from the date of the contract in the other; and in the event of the death of the beneficiary or the vendor, would be distributable as personalty to the next of kin, and would not descend to the heir as real estate.

To effect a conversion by will it is generally necessary that the words be imperative; and by contract, that its terms should be binding. Certain exceptions, however, to these general rules may occasionally occur.

The purposes for which a conversion is designed sometimes wholly or partially fail, and interesting questions then arise as to the effect of this failure upon the subsequent devolution of the estate. When the failure is total the rule is very simple, as no conversion then takes place. In cases, however, of partial

failure, the rules are more difficult of application, and cannot be condensed in a brief synopsis.

The parties interested in an estate directed to be converted may, if they all concur, elect to take it in its present and not in its changed state. By such an election there is effected what is called a re-conversion, by which the property is considered as retained in its actual condition, and is transferable and descendible accordingly. Re-conversion may sometimes, also, be effected by operation of law.

27. The next class of equitable rights which will require consideration embraces those which may be comprehended under the general head of Adjustment, and which includes the subordinate heads of Set-off, Contribution, Exoneration, Subrogation, and Marshalling. These equities are called into play for the purpose of securing the orderly and equitable adjustment of liabilities against the parties by whom, and in favor of those to whom they are justly due; and they all depend upon the general equitable principle that burdens ought to be thrown upon those who should justly bear them, but only in their due proportion and in their proper order, and that benefits should be secured to those who are of right entitled thereto, with a just regard to the rights of others.

The right of Set-off, although it is a right of equitable origin, has, nevertheless, been so effectually introduced by statute both in England and in this country, that the occasions for its application by courts of chancery are exceedingly rare. Mere matters of set-off will not give the court jurisdiction, for such rights can be effectually tried at law; but where there is anything peculiar in the case, so as to render it impossible for exact justice to be done by a court of law under the statutes, a court of chancery will afford relief through the medium of an equitable set-off.

The equity of Contribution arises when one of several parties, who are liable to a common debt or obligation, discharges the same for the benefit of all. In such a case he has a right to call upon his co-debtor for contribution. This right is most frequently exercised in the case of sureties; as is also the equity of Exoneration, which is a right of a person secondarily liable to call upon the party primarily liable, to discharge the debt, or to reimburse him if he has paid it.

The case of suretyship, however, is but an illustration of both of these rights; and the same equities are applicable to other relations out of which joint or successive liabilities have sprung.

The right of Subrogation is an auxiliary equity, called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities which the creditor may hold against the principal debtor, and by the use of which the party paying may thus be made whole. Thus a surety who pays a debt which has been reduced to judgment is entitled to have the judgment kept alive for his benefit, and to enjoy, as against the principal debtor, the advantages which could have been claimed by the judgment-creditor.

None of these equities are founded upon contract, but upon general principles of equity, and being all rights of a purely equitable nature, they are subject to the general qualification by which the exercise of all such rights is controlled, viz., that they must not be asserted in such a way, or under such circumstances, as to do violence to the rights and equities of other parties.

The doctrine of Marshalling grows out of the principle that a party having two funds to satisfy his demand shall not, by his election, disappoint a party who has only one fund. Thus, a person who has a mortgage on two parcels of land, ought not, in fairness, to resort in the first instance to one of them, upon which there also happens to be a junior mortgage which is not otherwise secured; for, in so doing the junior mortgagee might be altogether cut out. Equity, however, is loath to interfere with the rights of a creditor to enforce payment out of any of his securities, and therefore the remedy usually afforded to the junior disappointed mortgagee is to substitute him to the rights of the paramount mortgagee as against the other property.

The doctrine of Marshalling is applied in the administration of estates of debtors both during their lifetime and after their death; although in this country the necessity for its application to the estates of decedents has been very much lessened by the numerous legislative enactments whereby the distribution of the assets of a deceased debtor are regulated and controlled.

28. The last equitable rights which will be noticed are Liens. A lien is a right at common law; but it is a right which is

inseparable from the possession of the article on which the lien is claimed to exist.

In equity, however, a lien may exist wholly independently of possession, and under circumstances which would give the party no common-law right at all. There are several of these equitable liens, one of the most important of them being the vendor's lien upon real estate for unpaid purchase-money. This lien constitutes a charge upon the estate in the hands of the vendee, but it does not come into actual existence until a bill is filed to assert it. It is recognised in many of the United States; in others, however, it has never existed, or has been abolished or circumscribed by statute. Equitable liens are also created by deposits of title deeds, by mortgages and pledges of personal property, and by other contracts which in equity are treated as giving the party for whose benefit they are made distinct rights in specific property instead of general claims against the other party for damages. These liens have been applied to many classes of cases in modern times, and the sphere of their operation may be said to be constantly widening.

29. The next general division of chancery jurisdiction is that of Equitable Remedies; and the first, and one of the most important of these, is Specific Performance.

At common law the general rule was that all injuries were to be redressed by damages; and relief by a restoration of the injured party to the actual enjoyment of the thing or right of which he had been unjustly deprived, was never afforded except in the two cases of detinue and replevin. In equity, however, the rule is just the other way. A chancellor always aims at restoring the injured party to the exact position which he ought to have occupied if the wrong had never taken place. One of the means by which this object is attained is the equitable remedy by specific performance, which is, perhaps, most frequently used for the purpose of enforcing contracts for the sale of real estate, although it may be and is applied to other cases in which the common-law remedy is insufficient, by reason of the inadequacy of pecuniary damages, or from the impossibility of estimating them. This equitable remedy, however, is not applied except under certain restrictions and within certain limits.

Thus it is a fundamental principle that specific performance

will not be decreed unless the contract sought to be enforced is based on a valuable consideration, for the obvious reason that as the inadequacy of damages is the ground for equitable interference, there can be no such inadequacy where there is no damage sustained, as is the case with a mere volunteer.

Again, the complainant must show either that no damages could be recovered at law, or that the damages which might be recovered would fall short of affording complete redress. The reason for this rule is the obvious one that if money would operate as a full measure of redress, there is no ground whatever for the interference of a chancellor, as the complainant can get all he wants at law. It must, moreover, be observed that the jurisdiction to decree specific performance is always exercised subject to general equitable considerations; and that therefore a court of equity will not aid a complainant if he has been guilty of laches and negligence, or if equitable considerations interpose upon the other side—such as that the contract is hard and oppressive, or that the condition of things has materially changed, or the like.

Equity will not enforce a contract within the statute of frauds (*e. g.*, an agreement to sell real estate), unless it is reduced to writing; but to this rule there are some exceptions. Thus parol contracts may be enforced where there has been a sufficient part performance of the contract, or where its reduction to writing has been prevented by fraud, or where the contract is admitted by the defendant's answer, and the statute is not set up as a defence.

Equity, also, in applying this equitable remedy, will sometimes call into play subordinate equities, by decreeing specific performance with compensation for defects, and by giving time to make out a title beyond the day fixed in the contract. Upon the principle of specific performance, moreover, parties may be compelled to make good representations upon the faith of which other parties have been induced to act, and, upon the same principle, negative covenants may be enforced in terms.

30. The equitable remedy by Injunction may be described as in a certain sense the complement of the remedy by specific performance; as in the latter case a party is compelled to do what it is his duty to do; whereas by injunction he is restrained

from doing that which he ought not to do. Injunctions, however, are sometimes of a mandatory character, in which case they compel the performance of an act, and are, therefore, equivalent to a decree for specific performance. An injunction, in its legal sense, may consequently be defined to be a writ remedial issuing by order of a court of equity, and commanding a defendant to perform some act, or restraining a defendant from the commission or continuance of some act. The writ is, therefore, either mandatory or prohibitory. Injunctions are also either interlocutory, *i. e.*, made during the progress of the cause, or perpetual, *i. e.*, made upon final decree. They are either *ex parte* or after hearing; and were, formerly, either common or special; but the common injunction is now practically out of use, and all injunctions are special—*i. e.*, granted upon the merits as disclosed by affidavits or other proofs.

The purposes for which injunctions are issued are very numerous, and extend, in fact, over nearly the whole field of equitable jurisdiction. They may be divided into two general divisions, namely, first those cases in which the writ issues for the purpose of protecting *equitable* rights; and, secondly, those in which the writ issues for the purpose of protecting *legal* rights.

Injunctions are used for the purpose of protecting equitable rights in two ways: in the first place, by enjoining proceedings in the common-law courts, whereby and wherein such rights may be violated or disregarded; and, in the second place, by interposing for the protection of such equities, when injury thereto is threatened by other means than through legal proceedings.

Under the first of these heads it is well settled that equity will interfere to restrain proceedings at law, whenever, through fraud, mistake, accident, or want of discovery, one of the parties in a suit at law obtains, or is likely to obtain, an unfair advantage over the other, so as to make the legal proceedings an instrument of injustice.

It is difficult, perhaps, to mark out with precision the exact limits within which a court of equity will interfere with proceedings at law; but it may be stated generally that such an injunction will be granted whenever, in the common-law action, an equitable action is not recognised, or an equitable right not

enforced, or where exact and complete justice would not be done between the parties by reason of the want of an equitable remedy.

A court of equity, moreover, frequently interferes by injunction for the purpose of preventing unnecessary or vexatious litigation; and this it does in many ways, viz., by compelling a party to elect between two remedies; by restraining a party from bringing an action in another court after a court of equity has once obtained possession of a cause; by putting a stop to repeated attempts to litigate the same question; and by interfering to protect a party who is liable to discharge some debt, duty or obligation from vexatious suits by two or more parties severally claiming to be entitled to the benefit of such debt, duty, or obligation. Bills to restrain repeated attempts to litigate the same question are termed bills of peace, and are of two kinds, being filed either (first) to prevent the vexatious occurrence of litigation by a numerous class insisting upon the same right, or (second) to prevent the same individual from reiterating an unsuccessful claim. Bills to protect parties who are liable to several claimants in respect of the same debt, duty, or obligation, are called bills of interpleader, and are based upon the ground that a mere stakeholder, who claims no interest, ought not to be troubled by the actions of conflicting parties who do claim an interest. Such a bill, therefore, must show title in two claimants, and it must *not* show any interest in the subject-matter on the part of the party filing it.

Of the second general class of cases in which equity interferes by injunction for the purpose of protecting equitable rights, bills to restrain a trustee from committing breaches of trust, to restrain a partner from a violation of his duty as partner, or to restrain the disclosure of confidential communications or of trade secrets may be taken as illustrations. In such cases equitable titles and rights, and not those of common law, are infringed; and hence injunctions for the purpose of protecting them fall properly under the first of the two grand classes into which these writs have been divided.

Again, equity will interfere for the purpose of protecting *legal* rights. The occasions wihich most usually call for the interference of equity for this purpose are cases of waste, trespass,

nuisance, patent-right, copyright, literary property, trade-marks, alienation of property pending litigation, transfer of negotiable instruments, protection of property pending litigation, breach of negative covenants and corporations.

The nature of these injuries and the character of the relief which equity applies in each particular case will be explained.

31. Akin to the equitable remedies of specific performance and injunction, are those of Re-execution, Reformation, Rescission and Cancellation. All these remedies together embrace, as it were the complete circle of equitable relief in the case of contracts and duties. Thus a party may be held to a literal compliance with his contract by a decree for its specific performance; or he may be restrained from a violation of the contract by a writ of injunction; or, finally, if the written paper, which is the evidence of the contract, be lost, a re-execution may be ordered; if the contract has been erroneously expressed, a reformation may be decreed; and if, on the other hand, it has been obtained through fraud, it may be rescinded, and the documentary evidence may be directed to be delivered up and cancelled. Re-execution, reformation and cancellation are the means whereby the equities of accident, mistake and fraud are ordinarily worked out. Thus where instruments are lost through accident, the equitable remedy which is applied is re-execution; where an instrument has been erroneously framed through mutual mistake, so that it does not express the intention of the parties, and the mistake is clearly proved, the redress which is afforded is reformation; while, where a contract has been entered into in ignorance or mistake, or is tainted with fraud, the relief which a chancellor affords is rescission and cancellation.

32. The next equitable remedies which demand consideration are bills for Account, for Dower, for Partition, in cases of Confusion of Boundaries, and for the ascertainment of Rent. Bills for account arose from the inadequacy of the remedies at common law, those remedies being exceedingly limited in their scope, and cumbersome in their operation. In the equitable method of procedure, ground is first laid by obtaining discovery (when necessary) from the defendant, and the cause is then referred to a master before whom the account is taken.

Bills for partition and dower also had their origin in the

inadequacy of the common-law remedies. The superiority of the chancery practice in these cases is due to the fact that discovery may in this way be had, that masters and commissioners may be appointed to examine and report upon the rights of the parties, and that the decree may be moulded so as to embrace and adjust those rights in the subject-matter of dispute.

The equitable remedy for the ascertainment of boundaries is used when boundaries have become confused through the misconduct of the defendant, or of those under whom he claims; and a bill for the payment of rent will only lie in extraordinary cases, as where the days of payment are uncertain, or the remedy by distress has been lost without any fault of the owner of the land.

33. The equitable remedy of Partnership Bills is chiefly based upon the necessity for some kind of procedure, by which partnership affairs can be wound up and partnership assets administered; a procedure which it is manifest is not afforded by any of the forms of action at common law. Other relief is also incidentally afforded in equity. Thus accounts are taken, assets are got in and protected, breaches of partnership duty are enjoined, and sales of partnership effects are ordered. A great many desirable results are therefore accomplished in one suit; and justice is administered not only between the partners, but also between the two sets of creditors, which almost invariably exist in such cases, viz., the creditors of the firm and those of individual partners. In settling the conflicting claims of these two classes of creditors, certain equitable doctrines are applied by the courts, which are based mainly upon the general proposition that it is the equity of each partner that firm assets are, in the first place, to be taken to pay firm debts, and that the equities of the creditors are to be worked out through this equity of the partners. These doctrines might, with some propriety, be noticed under the general equity of adjustment; but their intimate connection with the subject of partnership bills would seem to render their consideration under the head of that equitable remedy still more appropriate.

The equitable remedy by Creditors' Bills is one which has been made use of very frequently in the United States. They are used for the purpose of getting at property of a debtor which

cannot be reached at law, either because it has been conveyed away beyond the grasp of an execution, or because it is of such a character that it cannot be seized under a common-law writ. Creditors' bills may be filed during the lifetime of the debtor, or after his death. In the latter case, they generally result in Administration Suits, as the executor does not usually admit assets; and, therefore, the decree is not simply for the payment of the creditor by whom the bill has been filed, but for a general administration of the debtor's estate. Legatees also may come into chancery for the ascertainment of assets, and the administration of the estate.

Under administration suits, also, will be considered certain subordinate equities, which more frequently arise in bills of this kind; these are the doctrines of Equitable Assets, of Performance, and of Satisfaction. In some instances the importance of these equitable doctrines has ceased by reason of statutory changes in the law.

34. The jurisdiction of the High Court of Chancery in England over the estates of Infants results from a prerogative of the crown as *parens patriæ*. In the United States, this jurisdiction is not of as much importance as in England, the persons and estates of minors being generally under the supervision of Orphans' Courts, Surrogates' Courts, or Courts of Probate, whose powers are regulated by statute. Still, in those States where courts of chancery with general equity powers exist, the jurisdiction is still exercised; and in some States such jurisdiction is expressly conferred by statute upon the equity courts. The principal incidents to this jurisdiction are that the ward must be educated under the court's superintendence, that his estate must be managed and applied under the like superintendence, and that his marriage must be with the sanction of the court.

The jurisdiction of the English Court of Chancery in the case of Lunatics and Idiots is peculiar in this respect, viz., that it is not exercised in a regular suit, but by the chancellor personally, on petition, and the appeal, if his order be erroneous, is to the king in council, and not to the House of Lords.

This jurisdiction is exercised (in the first place) for the purpose of ascertaining the fact of lunacy; and (secondly) for the support of the lunatic and the management of his estate. The

first end is attained by the issuing of a commission in the nature of a writ *de lunatico inquirendo*, under which the question of lunacy is passed upon by a jury; and the second purpose is accomplished by the appointment of a committee to take charge of the person and estate of the lunatic.

The care of the persons and estates of lunatics and idiots is governed in many States by statutes; in some States, however, courts of chancery exercise jurisdiction over this subject.

35. A bill for discovery is one whereby the power of the court is invoked for the purpose of compelling the defendant to discover and set forth upon oath every fact and circumstance within his knowledge, information and belief, material to the plaintiff's case. It is an equitable remedy of great antiquity, and was formerly of very great importance, as no power to elicit testimony from a party to a cause existed at common law. At the present day, however, the necessity for the exercise of this equitable remedy has become much less frequent than formerly, as in the federal courts, in those of most of the United States, and of England, parties are now competent and compellable to testify.

The general right to discovery is fenced about by certain prohibitions and restrictions, whereby the power of the court is prevented from being abused. Thus, in the first place, no person need discover matters tending to criminate himself or to expose him to penalty or forfeiture; in the second place, no one is compellable to discover confidential communications which have passed between him and his legal adviser; and lastly, persons occupying official positions cannot be compelled to disclose matters of State, the publication of which would be prejudicial to the community.

Subject to these restrictions, every competent defendant in equity must answer as to all facts material to the plaintiff's case; he must answer to all, and not to a portion only; and he must answer distinctly, completely, and without needless prolixity, and to the best of his information and belief.

A court of equity will not only compel a defendant to answer under oath, but will also, where it is necessary, oblige him to produce books and documents which are in his possession or control, which are material to the complainant's case, and which do not fall within any of the protecting rules mentioned above.

In the United States this power is largely exercised by common-law courts under statutory provisions.

Courts of equity also have jurisdiction to issue commissions to examine witnesses abroad; to entertain bills for the perpetuation of testimony when a right cannot be immediately determined; and to order examinations *be bene esse* to be used in their own proceedings or in those of other courts.

36. The last equitable remedies which require notice are bills *Quia Timet*, the appointment of Receivers, writs of *Ne Exeat*, and writs of *Supplicavit*.

Bills *quia timet* are analogous to the *brevia anticipantia* (writs of prevention) at common law. Their object is to prevent anticipated mischief, or to protect a party from vexatious litigation which is likely to occur. Thus, where a man covenants to save another harmless in respect to certain payments which are to be made from time to time, a bill may be filed, before any breach, for the purpose of obtaining a decree that the defendant shall specifically perform his covenant, and a reference to a master will be directed to report from time to time any breach that may happen, so that action of the court may be at once taken thereon. So also bills may be filed for the purpose of compelling a party who has a *primâ facie* right, to assert it within a reasonable time. Sometimes, also, bills which are filed for the purpose of removing a cloud from a title, may fall under the same class.

Another instance of the preventive remedies of the Court of Chancery is that of the appointment of receivers. These appointments are made for the purpose of preserving property, and of preventing threatened or anticipated injury thereto. A receiver is an indifferent person between the parties appointed by the court to collect and receive the rents, issues and profits of land, or the produce of personal estate, or other things in question, pending the suit, which it does not seem reasonable to the court that either party should do, or where a party is incompetent to do so, as in the case of an infant. The objects sought by such appointments are, in general, to provide for the safety of property pending the litigation which is to decide the rights of litigant parties, or during the minority of infants, or to preserve property in danger of being dissipated or destroyed by those to whom it is by law intrusted, or by persons having immediate,

but partial interests therein. This equitable remedy is manifestly founded on the want of any such remedy at common law.

A writ of *ne exeat* is a writ to restrain a person from leaving the jurisdiction; and was originally used for purposes of state only, but is now extended to private transactions. It operates in the nature of equitable bail. It is mostly used where a suit is commenced in chancery against a party, who, designing to defeat the other of his just demand, or to avoid the justice and equity of the court, is about to go beyond the sea, so that the duty will be endangered if he goes. This writ was originally a high prerogative writ, but it has now become an ordinary process of courts of equity, and has been extensively used on both sides of the Atlantic.

A writ of *supplicavit* is a writ granted upon the complaint of a suitor of the court that he is abused and stands in danger of his life, or is threatened with death by another suitor, who is thereupon taken into custody, and must give bail (if the case is made out against him) for good behavior. It will be observed that this writ is in the nature of process to find sureties of the peace; and as this end is now ordinarily attained by other means, the writ of *supplicavit* has fallen into almost total disuse, and has been refused in modern cases because of the completeness of the common-law remedies.

CHAPTER III.

MAXIMS IN EQUITY.

37. No right without a remedy.
38. Equity follows the Law.
39. *Vigilantibus non dormientibus Æquitas subvenit.*
40. Between equal equities the law will prevail.
41. Equality is Equity.
42. He who comes into Equity must do so with clean hands.
43. He who seeks Equity must do Equity.
44. Equity looks upon that as done which ought to be done.
45. Between equal equities priority of time will prevail.
46. Equity imputes an intention to fulfil an obligation.
47. Equity acts *in personam.*
48. Equity acts specifically.

37. A MAXIM is the embodiment of a general truth in the shape of a familiar adage. There are in equity several of these maxims in which the general principles of chancery jurisdiction, and the methods by which they are applied, are thus succinctly expressed.

I. The first of these maxims is that equity will not suffer a right to be without a remedy. The principle expressed by this maxim is, indeed, the foundation of equitable jurisdiction, because, as we have seen, that jurisdiction had its rise in the inability of the common-law courts to meet the requirements of justice.

And it may be further observed that equity will not only not suffer a wrong to be without a remedy, but it will make the remedy, when applied, a complete one. When a court of chancery acquires jurisdiction for any purpose it will, as a general rule, proceed to determine the whole cause, although in so doing it may decide questions which, standing alone, would furnish no basis of equitable jurisdiction.[1] For example: Courts of

[1] Natbrown *v.* Thornton, 10 Ves. 159; McGowen *v.* Remington, 2 Jones (12 Pennsylvania State Reports) 57; Brooks *v.* Stolley, 3 McLean, 523; Walters *v.* Farmers' Bank of Va., 76 Va. 12; Pearson *v.* Darrington, 21 Alab. 169; Mays *v.* Taylor, 7 Georgia, 238; Franklin Ins. Co. *v.* McCrea, 4 Green, (Ia.) 229; Handley's Executor *v.* Fitzhugh, 1 A. K. Marsh. 24; Keeton *v.*

Equity have no jurisdiction to give damages or compensation when these constitute the sole grounds of the bill.[1] But where the bill seeks other relief which can be had in equity alone, and damages are incidental to this relief, equity, having proper possession of the cause for the purpose of relief which is purely equitable, will proceed to determine the whole case.[2]

Whenever, therefore, an infringement of legal rights of a civil, as distinguished from a criminal, nature exists, for which there is no other remedy, a court of chancery will be ready to afford one, and to make that remedy complete.

Some qualifications are to be attached to the maxim now under consideration. In the first place, the right must be one of which municipal law can take cognisance, and not one which falls merely within the scope of moral law. There are matters in which a man is answerable in *foro conscientiæ* alone, and with these equity cannot interfere. Thus, while the jurisdiction of courts of equity in questions of fraud is very broad, it nevertheless does not pretend to set aside a transaction simply because it is dishonorable, or opposed to that delicate sense of right which every conscientious man ought to have. In other words, equity does not pretend to enforce all the principles of sound morals. "It cannot," to quote the language of the Supreme Court of the United States in a comparatively recent case,[3] "assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations."

In the second place, equity will not afford relief where there has always been a full, adequate and complete remedy at law.[4] In such a case there is no ground for the interference of equity.[5]

Spradling, 13 Missouri, 321; Armstrong *v.* Gilchrist, 2 Johns. Cases, 424; Sanborn *v.* Kittredge, 20 Vern. 632; Wilhelm's Appeal, 29 P. F. Sm. 120.

[1] Story's Eq. Jurisp., § 794; Ferson *v.* Sanger, Davies, 252.

[2] Ferson *v.* Sanger, Davies, 252; White *v.* Fratt, 13 Cal. 521; Wiswall *v.* McGown, 2 Barb. 270; Shepherd *v.* Sanford, 3 Barb. Ch. 127; Howard *v.* Jones, 5 Ired. Eq. 75; Anderson *v.* Arrington, 1 Jones Eq. 215. See also, Taylor *v.* The Insurance Company, 9 How. 404, where a court of equity decreed the payment of a policy of insurance, jurisdiction having been taken in order to compel the specific performance of an agreement to insure.

[3] Rees *v.* City of Watertown, 19 Wallace, 121. See also Aspden *v.* Seddon, L. R. 1 Ex. D. 496, 10 Ch. 394.

[4] Story's Eq. Jurisp., § 33.

[5] See Gallagher *v.* The Fayette County R. R. Co., 2 Wright, (Pa.) 102.

Thus, a bill in equity will not lie simply to recover possession of land, because for this there is a complete remedy at common law by ejectment. Such bills have been termed "Ejectment bills,"[1] and are demurrable. And so (to give another illustration), while equity, as will be hereafter seen, may, in certain cases, restrain acts of destructive trespass by injunction, yet this is only done in those cases in which redress by the common-law action of trespass would be inadequate, and consequently equity will decline to interfere whenever the damages given in the common-law action would furnish an effectual redress.[2]

When the jurisdiction of courts of chancery depends upon precise statutory regulations, the operations of this maxim are, of course, controlled by the language of the particular legislative provision by which it is regulated.[3] And so where a case,

Bonebright *v.* Pease, 3 Mich. (Gibbs) 318; Ellis *v.* Davis, 109 U. S. 485; Litchfield *v.* Ballou, 114 Id. 190; Kimbal *v.* Grafton Bank, 20 N. H. 347; Burnham *v.* Kempton, 44 Id. 78; Kyle *v.* Frost, 29 Ind. 382; Koockogey *v.* Flewellen, 14 Ga. 608; Drew *v.* Hayne, 8 Ala. 438; Patterson *v.* Lane, 11 Casey 275; Koch's Appeal, 93 Pa. St. 434; Pittsburgh & Connelsville Rd. Co.'s Appeal, 99 Id. 177; Redmond *v.* Dickerson, 1 Stock. 507; Woodbridge *v.* Irslee, 37 N. J. Eq. 397; Foster *v.* Swasey, 2 Wood & M. 217; Coombe *v.* Meade, 2 Cr. C. Ct. 547; Drew *v.* Hayne, 8 Ala. 438; Smith *v.* Short, 11 Ia. 523; Clayton *v.* Carey, 4 Md. 26; McCullough *v.* Walker, 20 Ala. 389; Wolcott *v.* Robbins, 26 Conn. 236; Ohling *v.* Luityens, 32 Ill. 23; Green *v.* Spring, 43 Id. 280; Douglass *v.* Martin, 103 Ill. 25; Roberts *v.* Taliafero, 7 Ia. 110; Young *v.* Young, 9 B. Mon. 66; Green *v.* Spalding, 76 Va. 411; Wordekoff *v.* Evers, 18 Fla. 339; Buckner *v.* Chicago, M. & A. Ry. Co., 56 Wis. 403; Vick *v.* Percy, 15 Miss. 256; Curtis *v.* Blair, 26 Id 309; Shotwell *v.* Lawson, 30 Id. 27; Bobb *v.* Woodman, 42 Mo. 482; Waddell *v.* Bech, 1 Stock. 793; Van Syckel *v.* Emery, 3 Green, 387; Milton *v.* Hogue, 4 Ired. Eq. 415; Simmons *v.* Hendricks, 8 Id. 84; Struther *v.* Belsey, 79 Ill. 307; Stewart *v.* Mumford, 80 Id. 192; Bruner *v.* Meigs, 64 N. Y. 506; Pratt *v.* Longworth, 27 Ohio St. 159; Frue *v.* Loring, 120 Mass. 507; Cole *v.* Colly, 37 N. H. 48.

[1] Renison *v.* Ashley, 2 Ves. Jr. 461; Loker *v.* Rolle, 3 Id. 4; Hecht *v.* Colquhoun, 57 Md. 563; Odle *v.* Odle, 73 Mo. 289; Gage *v.* Abbott, 99 Ill. 366; Oakley *v.* Hurlbut, 100 Ill. 204; Tillmes *v.* Marsh, 17 P. F. Sm. 510; North Penna. Coal Co. *v.* Snowden, 6 Wright, 488; Frisbie's Appeal, 7 Norris, 146; Richard's Appeal, 100 Pa. St. 51; Washburn's Appeal, 105 Id. 480; Whitney *v.* Stevens, 97 Ill. 487; and Jones *v.* Fox, 20 W. Va. 370.

[2] Clark's Appeal, 12 P. F. Sm. 450. Enterprise Transit Co.'s Appeal, 9 W. N. C. 225; Grubb's Appeal, 9 Norris, 223; Barclay's Appeal, 93 Pa. St. 50; Alden's Appeal, 9 W. N. C. 442.

[3] See Boyce *v.* Grundy, 3 Peters 215; Oelrichs *v.* Spain, 15 Wall. 228; Grand Chute *v.* Winegar, Id. 375; Woodman *v.* Freeman, 25 Me. 631; Clark *v.* Robinson, 58 Id. 137; Jones *v.* Newhall, 115 Mass. 244; and *ante*, p. 31, *et seq.*, notes.

formerly cognisable in chancery alone, is, by statute, brought within the scope of common-law jurisdiction, the equitable jurisdiction may sometimes be ousted. Thus it has been decided in South Carolina and in Michigan that the power conferred by statute of calling the opposite party as a witness in common-law actions, has taken away the jurisdiction by bills for discovery in chancery.[1] But under the statutes in several other States and in England a different rule prevails.[2]

Nor does the mere fact that, in the particular case before the court, the legal remedy has failed, justify the interposition of a court of equity. Thus, in Rees *v.* City of Watertown,[3] a bill was filed by a holder of certain municipal bonds, setting forth that he had obtained judgment thereon, and that he had failed to obtain satisfaction by process of *mandamus*. The bill prayed that the taxable property of the citizens, which was (it alleged) a trust-fund for the payment of the city's debts, might be subject by the decree to the payment of the complainant's judgments, and that the marshal of the district might be empowered to seize and sell so much of it as might be necessary for that purpose. But the court refused the relief on the ground that the proper remedy was by *mandamus*, and that the mere circumstance that *that* remedy had failed in the particular case did not give a court of chancery jurisdiction. The same

[1] Hall *v.* Joiner, 1 S. C. 186; Riopelle *v.* Doellner, 26 Mich. 102; McGough *v.* Ins. Bank, 2 Ga. 151.

[2] Shotwell's Admr'x *v.* Smith, 5 C. E. Green, 79; Cannon *v.* McNab, 48 Alab. 99; Millsapps *v.* Pfeiffer, 44 Miss. 805; Lovell *v.* Galloway, 17 Beav. 1; British Empire Shipping Co. *v.* Somes, 3 K. & J. 433; Snell's Eq. 519; Smith's Outline of Eq. 483: and see *post* § 175. See also, upon the general subject as to how far equity will retain its jurisdiction notwithstanding similar jurisdiction has been conferred upon common-law courts: Waldron *v.* Simmons, 28 Alab. 629; Bright *v.* Newland, 4 Sneed, 440; King *v.* Payan, 18 Ark. 283; People *v.* Houghtaling, 7 Cal. 348; Crain *v.* Barnes, 1 Maryl. Ch. 151; Payne *v.* Bullard, 23 Miss. 88; Mitchell *v.* Otey, Id. 236; Clark *v.* Henry's Adm'r, 9 Missouri 339; Dobyns *v.* McGovern, 15 Id. 662; Wells *v.* Pierce, 7 Foster, 503; Irick *v.* Black, 2 C. E. Green 189; Force *v.* The City of Elizabeth, 12 C. E. Green, 408; Oliveira *v.* University, Phillips's Eq. 69.

On the other hand where equity powers, which were not previously enjoyed, are conferred upon courts by statute, such gift does not affect the exercise of relief under common-law forms. Aycinena *v.* Peries, 6 W. & S. 257; Biddle *v.* Moore, 3 Barr, 161; Corson *v.* Mulvany, 13 Wright, 88; Church *v.* Ruland, 14 P. F. Sm. 441.

[3] 19 Wal. 121.

ruling was made in Heine *v.* The Levee Commissioners,[1] where it was said that the total failure of ordinary remedies did not confer upon the court of chancery an unlimited power to give relief, and that neither such failure nor the hardship of the case, allows a court of equity to administer abstract justice at the expense of well-settled principles.[2]

But if a court of equity has originally assumed jurisdiction over a particular class of cases, it will not, as a general rule, be ousted from that jurisdiction simply because in the progress of common-law improvement redress comes to be subsequently attainable at law.[3]

Moreover, the remedy at law must be plain, adequate and complete, otherwise the jurisdiction of a court of equity will attach.[4] Thus in Watson *v.* Sutherland,[5] where goods in the possession of B. were levied on as the property of A., and the result of the levy would have been to ruin the credit and break up the business of B., the court enjoined the execution-creditor, on the ground that the damages which could have been recovered in a common-law action by B. would have been entirely inadequate to compensate him for the loss he would sustain.

In the third place, equity will not give a remedy in direct contravention of a positive rule of law. The doctrine of equity upon this subject is thus illustrated by Mr. Justice Blackstone: "Hard," he says, "was the case of bond-creditors whose debtor devised away his real estate; rigorous and unjust the rule which put the devisee in better condition than the heir; yet a court of equity had no power to interfere. Hard is the common law still

[1] 19 Wal. 658.

[2] See also Carlton *v.* Salem, 103 Mass. 143; Heilman *v.* The Union Canal Co., 1 Wright, (Pa.) 100; Dowell *v.* Mitchell, 105 U. S. 432.

[3] Kemp *v.* Prior, 7 Ves. Jr. 249; Bromley *v.* Holland, Id. 19; Wesley Church *v.* Moore, 10 Barr, 273, 279; 280; Sweeney *v.* Williams, 36 N. J. Eq. 627; Story's Eq. § 64 *i.*

[4] Jones *v.* Newhall, 115 Mass. 244; Story's Eq., § 33. See, also, Thompson *v.* Allen County, 115 U. S. 550; Madison Av. Church *v.* Madison Av. Church', 26 How. Pr. 72; City of Hartford *v.* Chipman, 21 Conn. 488; Scott's Adm'rx *v.* Scott, 33 Ga. 102; Skilton *v.* Webster, Bright. 203; Kirkpatrick *v.* McDonald, 1 Jones, (Pa.) 392; Bank of U. S. *v.* Biddle, 2 Pars. Sel. Eq. 31; Bierbower's Appeal, 107 Pa. St. 14; Sweeney *v.* Williams, 36 N. J. Eq. 627; Hay *v.* Alexandria R. R. Co., 1 Hugh. 168; Cadigan *v.* Brown, 120 Mass. 403; Richardson *v.* Brooks, 52 Miss. 118; Courtwright *v.* Burns, 3 McCrary C. C. 60.

[5] 5 Wall. 74.

subsisting that land devised or descending to the heir should not be liable to simple contract debts of the ancestor or devisor, although the money was laid out in purchasing the very land; and that the father shall never immediately succeed as heir to the real estate of the son. But a court of equity can give no relief, though in both these instances the artificial reason of the law arising from feudal principles has long since ceased."[1]

This rule is recognised to its full extent in the equity jurisprudence of the United States. If a transaction is condemned under the force of legal rules, it cannot receive a more favorable consideration in a court of equity on account of any hardship to particular parties; and legal rights acquired by the prosecution of a lawful demand in a lawful way will not be disturbed by a chancellor.[2]

It may be added here that where the amount in controversy is very trivial, equity will not take cognisance of the cause.[3]

38. II. The second maxim which will be noticed is that equity follows the law. The meaning of this maxim is that equity applies to equitable titles and interests those rules of law by which legal titles and interests are regulated, provided this can be done in a manner not inconsistent with the equitable titles and interests themselves. Thus equitable estates are subject to the same laws of inheritance as legal estates, and their devolution is the same. And so, as at common law, the husband was entitled absolutely to his wife's chattels in possession, he is in like manner considered entitled to chattels of which she is the equitable owner. But where the property is settled to the separate use of a *feme covert*, equity will not suffer the title of the husband to be asserted, for to do so would be to defeat the title which has been created in equity for the benefit of the wife. In the case of executory trusts, also, equity will sometimes refuse to apply the strict rules by which legal estates are controlled; but this is because such trusts are in an inchoate

[1] 3 Black. Com. 430; Story's Eq. Jurisp., § 12.

[2] Burke *v.* Murphy, 27 Miss. 167; McCourtney *v.* Sloan, 15 Mo. 95; State *v.* McBride, 76 Ala. 51.

[3] Moore *v.* Lyttle, 4 J. C. R. 183; McNew *v.* Toby, 6 Humph. 27. See also Swedesborough Church *v.* Shivers, 16 N. J. Eq. 453; Cowan *v.* Jones, 27 Ala. 317; Chapman *v.* B. and T. Pub. Co., 128 Mass. 478.

condition, and the exact quality and duration of the estate is not, in them, strictly defined.

Equity also may be said to follow the law when rights in equity are considered barred by lapse of time in analogy to the statutes of limitations.[1]

39. III. Another maxim is *vigilantibus non dormientibus æquitas subvenit*, the meaning of which is sufficiently obvious. It is designed to provoke diligence, to punish laches, and to discourage the assertion of stale claims.[2] By virtue of this maxim such claims are rejected in equity, independently of any statute of limitations.[3] In many cases equitable relief depends upon the discretion of the chancellor, and the laches of the complainant is often one of the most important of the elements which are taken into consideration when that discretion is exercised.

Courts of equity sometimes consider themselves bound by the statutes of limitation; in other cases they act by analogy only.[4] But lapse of time and the staleness of a claim may constitute a defence in a court of equity where no statute of limitation governs the case. In such cases courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights.[5]

40. IV. Between equal equities the law will prevail. If two persons have each an equally good equitable right, and but one of them has the legal title to the subject of the dispute, equity will not interfere, but leave them to the courts of law, when, of course, the holder of the legal title will prevail. Thus if a purchaser for a valuable consideration, without notice of a prior equitable right, obtains the legal estate at the time of his purchase, he will be entitled to priority in equity as well as at law.[6]

[1] See Lansing *v.* Starr, 2 J. C. R. 150; Bickel's Appeal, 5 Norris, 204; Beckford *v.* Wade, 17 Ves. 99; Higgins *v.* Crawfurd, 2 Ves. 571; Prince *v.* Heylin, 1 Atk. 493; and *post*, § 203.

[2] Lacon *v.* Briggs, 3 Atk. 105. See Ellison *v.* Moffatt, 1 Johns. Ch. 46; Phillips *v.* Prevost, 4 Id. 215; Price's Appeal, 4 P. F. Sm. 472; Germantown Pass. Railway Co. *v.* Fitler, 10 Id. 133; Leaming *v.* Wise, 23 Id. 173.

[3] Smith's Eq. 19; Hill on Trustees, 169, note.

[4] See and consider Fullwood *v.* Fullwood, 9 Ch. Div. 176.

[5] Badger *v.* Badger, 2 Wall. 94. See also the language of Lord Camden in Smith *v.* Clay, 3 Bro. C. C. 639.

[6] Note to Basset *v.* Nosworthy, 2 Lead. Cas. Eq. 5.

A good illustration of the effect which equity gives to the acquisition of the legal title in those cases in which the equities are equal is afforded by Thorndike *v.* Hunt.[1] There a trustee, under two different settlements, having misappropriated the funds of one, replaced them by a transfer of funds belonging to the other. In a suit instituted by the *cestui que trust* under the first settlement, the trustee transferred the money into court, and the fund was treated as belonging to that estate, the legal title consequently resting in the accountant general for the purposes of that trust. The question was whether the *cestui que trust* under the second settlement had a right to follow this fund, and it was held that he had not, because the transfer being without notice and for value (*i. e.*, in discharge of the debt due by the defaulting trustee) the *cestui que trust*, under the first settlement, had just as strong an equity to retain the fund as the *cestui que trust* under the second settlement had to follow it, and it therefore followed that the circumstance of the legal title being held by the accountant general for the former, was enough to create a preference in his favor.[2]

41. V. Another equitable maxim is that equality is equity. This may be illustrated by the manner in which the court acts in the case of a power in trust, where the donee of the power who has the option of selecting out of a class has failed to exercise his discretion.[3] In such a case, if there is more than one intended beneficiary, equity will divide the property equally among all.

So also in the case of joint purchasers the leaning of courts of equity is against the right of survivorship, and in favor of treating the parties as interested in the subject-matter of the purchasers as tenants in common in proportion to the sums respectively contributed by each.[4]

42. VI. He who comes into equity must do so with clean hands; or, as the maxim has been otherwise expressed, "he that hath committed iniquity shall not have equity."[5] Thus a

[1] 3 DeG. & Jo. 563.

[2] Snell's Eq. 18, 19; Note to Basset *v.* Nosworthy, 2 Lead. Cas. in Eq. 11.

[3] See *post*, Part I., Chap. II.

[4] See Lake *v.* Gibson, 1 Lead. Cas. Eq. 177, and notes.

[5] Francis 5. See Cadman *v.* Horner, 18 Ves. 10; Creath *v.* Sims, 5 Howard, 192; Bleakly's App., 16 P. F. Sm. 191; Blystone *v.* Blystone, 1 Id. 373; Helsley *v.* Fultz, 76 Va. 671; Sandeford *v.* Bewis, 68 Ga. 482; Kunkle's Appeal, 107 Pa. St. 368; Shorner *v.* Spear, 92 N. C. 148.

party who seeks to set aside a transaction on the ground of fraud must himself be free from any participation in the fraud, if he desires relief in equity;[1] and, on the same principle, equity will not lend its aid to assist a gambling transaction, or to enforce penalties, or to aid in the harsh assertion of legal rights.[2]

Upon the same principle when one of several confederates to a fraudulent transaction has acquired the result of the fraud, equity will not aid the others in obtaining their share of the spoils.[3] Of course this maxim only applies to the particular transaction under consideration, for the court will not go outside of the case for the purpose of examining the conduct of the complainant in other matters, or questioning his general character for fair dealing. Nor is it every prosecution of an unfounded claim that will bar a man from coming into a court of equity; there must be wilful misconduct in regard to the matter in litigation.[4]

But equity will not necessarily refuse its aid simply because the fund or other subject-matter, in respect of which the relief is asked, may have been originally created by an illegal transaction. Thus in Sharp *v.* Taylor[5] the complainant and defendant were partners in a vessel, which being American built, could not be registered in Great Britain according to the navigation laws of that kingdom, nor could the owners, who were British subjects residing in England, have her registered in the United

[1] See Wheeler *v.* Sage, 1 Wallace, 518.

[2] See Lessig *v.* Langton, Brightly's R. 191; *Post* sec. 181, and cases cited; Clinton *v.* Myers, 46 N. Y. 511. The rule is sometimes applied to persons claiming common-law or statutory rights. Thus a debtor may forfeit his claim to the benefit of the exemption laws by fraudulent concealment of his property. See Emerson *v.* Smith, 1 P. F. Sm. 90.

[3] Johns *v.* Norris, 7 C. E. Green, 102; Walker *v.* Hill's Executors, Id. 513. See also Allen *v.* Berry, 50 Mo. 90; Musselman *v.* Kent, 33 Ind. 452; Hibernia Society *v.* Ordway, 33 Cal. 679; Hunt *v.* Rowland, 28 Iowa, 349; Marcy *v.* Dunlap, 5 Lans. 365; Paine *v.* Lake Erie R. & Louisville R., 31 Ind. 283; Gannett *v.* Albree, 103 Mass. 372; Farley *v.* St. Paul M. & M. Ry. Co., 14 Fed. Rep. 114.

[4] Snell's Prin. Eq. 25; Lewis and Nelson's Appeal, 17 P. F. Sm. 166; Meyer *v.* Yesser, 32 Ind. 294; Bateman *v.* Fargason (U. S. C. C. West. D. of Tenn.), 10 Rep. 763.

[5] 2 Phil. Ch. 801. See Reed *v.* Marshall, 9 Norris, 346, for a case of misapplication, by the court below of the doctrine under consideration, and a consequent reversal by the Supreme Court.

States. They undertook to violate the laws of both countries by having her falsely registered in Charleston, South Carolina, as owned by a citizen and resident of that place. In this condition she made several trips which were profitable, and the defendant, colluding with Robertson, the American agent, in whose name the vessel had been registered, refused to account with the complainant for his share of the profits, or to acknowledge his interest in the ship. The complainant filed a bill for an account, and the illegality of the traffic and the violation of the navigation laws were set up as precluding the court from granting relief, but the Lord Chancellor decreed an account. Similar decisions have been made both in England and in this country.[1]

43. VII. He who seeks equity must do equity. The usual illustration of this maxim is the case of a borrower of money on usurious interest, who comes into a court of equity to ask for relief by having the transaction set aside. Equity will not afford him redress except upon the terms of his returning the amount actually borrowed with lawful interest, because it is as equitable that the person who has loaned the money should have the amount with lawful interest returned to him, as that the borrower should be relieved from his unjust obligation to pay a usurious rate.[2] So also a mortgagor who files a bill to redeem, must offer to do equity by paying the mortgagee his debt, interest and costs.[3] Another, and a striking illustration of this maxim, is found in the rule that when a husband comes into chancery for the purpose of getting in his wife's equitable property, he will not be assisted except upon the terms of making a reasonable settlement upon his wife.[4] Other illustrations of the application of this maxim will be found in authorities cited

[1] Farmer *v.* Russell, 1 Bos. & Pul. 296; McBlair *v.* Gibbes, 17 How. 237; Brooks *v.* Martin, 2 Wallace 81. See Maybin *v.* Coulon, 4 Dall. 298 (an action at law). See, however, Snell *v.* Dwight. 120 Mass. 9; Durham *v.* Presly, Id. 285.

[2] Fanning *v.* Dunham, 5 Johns. Ch. 122. See also Sporrer *v.* Eifler, 1 Heisk. 633; Corby *v.* Bean, 44 Missouri, 379.

[3] Lanning *v.* Smith, 1 Pars. Eq. C. 16.

[4] See § 109 *et seq.* See, on the general maxim, Secrest *v.* McKenna, 1 Strobh. Eq. 356; Richardson *v.* Linney, 7 B. Mon. 571; Mumford *v.* Am. Life Ins., 4 Coms. 463.

in the note.[1] Among these Willard *v.* Tayloe[2] may be particularly referred to. In that case it appeared that a contract of purchase and sale of certain real estate had been entered into in 1854, at which time gold and silver coin were the only lawful money of the United States. In April, 1864, the purchaser made a tender of an instalment of the purchase-money in legal tender notes, and, on the refusal of the vendor to accept them, filed a bill for specific performance of the contract. It was held that he was entitled to a decree, but only on condition that the stipulated sum should be paid in coin.

The maxim is applicable to a defendant as well as to a plaintiff; and a party who seeks to avail himself of an equitable defence must stand the test of the doctrine under consideration, as well as one who appears as plaintiff in a cause.[3]

44. VIII. Equity looks upon that as done which ought to be done.[4] This is a very important maxim, and one which lies at the foundation of many of the great doctrines in equity. For the purpose of reaching exact justice, equity will frequently consider that property has assumed certain forms with which it ought, in justice, to be stamped, or that parties have performed certain duties which they ought, in justice, to fulfil; and will regulate the enjoyment and transmission of estates and interests accordingly. Thus, where a testator has imperatively directed land to be sold and turned into money, equity will consider that

[1] Comstock *v.* Johnson, 46 New York, 615; Campbell *v.* Campbell, 21 Mich. 438; McLaughlin *v.* McLaughlin, 5 C. E. Green, 190; Morrison *v.* Hershire, 32 Ia. 271; Smith *v.* Auditor General, 20 Mich. 398; Merrill *v.* Humphrey, 24 Mich. 170; Board of Montgomery County *v.* Elston, 32 Ind. 27; Dean *v.* Charlton, 23 Wis. 590; Creed *v.* Scruggs, 1 Heisk. 590; Willard *v.* Tayloe, 8 Wallace 557; Wales *v.* Coffin, 105 Mass. 328; Lohman *v.* Crouch, 19 Gratt. 331; Reed *v.* Tyler, 56 Ill. 288; Winslow *v.* Noble, 101 Id. 194; Phillips *v.* Phillips, 50 Missouri, 603. See remarks of Ch. J. Waite in Fosdick *v.* Schall, in 9 Otto, 253.

[2] 8 Wallace, 557. But see McGoon *v.* Shirk, 54 Ill. 408.

[3] Tongue *v.* Nutwell, 31 Maryl. 302.

[4] "When chancery interposes to compel the performance of an act which has been covenanted to be performed, it always treats the subject as if it had been performed at the time contracted. The act which chancery desires to be done is the same act as would have existed had it been done when it was agreed to have been done." Reeve's Dom. Relations, tit. Chancery 446; Jordan *v.* Cooper, 3 S. & R. 585.

the *conversion* (as it is termed) has taken place from the instant of the testator's death, and the subsequent devolution of the property will be governed by the rules which control, not real, but personal estate. And so, as it is the duty of a trustee to deal with the trust property for the benefit of the *cestui que trust*, a profit made in his own name will be regarded as made for the benefit of the trust estate. This maxim will be found running through the whole system of equity jurisprudence.

45. IX. The next maxim is that between equal equities priority of time will prevail. This is the rule which is applied to determine the order between conflicting equities. If nothing else intervenes to turn the scale, the man who is first in time will be first in right. The maxim is frequently applied in questions which arise under titles acquired through equitable assignments, and the nature of this doctrine and the reason of its application have thus been stated by very high authority: "Now I take it," said Lord Westbury, in Phillips *v.* Phillips,[1] "to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled in equity passes only that which he is justly entitled to and no more. If, therefore, a person seized of an equitable estate, the legal estate being outstanding, makes an assurance by way of mortgage or grants an annuity and afterwards conveys the whole estate to a purchaser, he can only grant to a purchaser that which he has, viz., the estate subject to the annuity or mortgage and no more. The subsequent grantee takes only what is left in the grantor. Hence grantees and encumbrancers claiming in equity, take and are ranked according to the dates of their securities, and the maxim applies, *Qui prior est tempore, potior est jure.* The first grantor is *potior* that is *potentior.* He has a better and superior, because a prior, equity."

46. X. Equity imputes an intention to fulfil an obligation. What is meant by this maxim is that when a person covenants to do an act, and he does that which may either wholly or partially be converted to or towards a completion of the covenant, he shall be presumed to have done it with that intention. In

[1] 4 De. G. F. & J. 218; Snell's Eq. 25.

the case of Wilcocks *v.* Wilcocks, which is a leading authority upon this point, a person covenanted to *purchase and to settle* lands of a certain value, and afterwards purchased lands of equal or greater value which descended upon his heir, and it was deemed a performance of the covenant.[1] Upon the same principle a purchase in the name of a child will be considered as an advancement and not as a resulting trust for the benefit of the father (the purchaser);[2] and a legacy to a child will be treated as a provision.[3]

47. XI. Equity acts *in personam.* It was against the *person* that the jurisdiction of the court of chancery was originally acquired.[4] One of the ordinary means of enforcing obedience to the decrees of a court of equity is by an attachment against the person of the defendant. Hence, when the *parties* are within the jurisdiction of a court of chancery, it will not ordinarily hesitate to grant relief, although the property to be ultimately affected by the decree may lie in another forum. Thus the court of chancery in England decreed specific performance of a contract respecting the boundaries of Pennsylvania and Maryland, when colonies, entered into by the proprietaries;[5] and a trustee residing in one State may be compelled to make a conveyance of real estate situated in another.[6]

It follows from this, however, that a decree in equity cannot, of itself, divest a title at law, but can only compel the holder to convey.[7]

The question is one of great practical importance in foreclosure suits against railroad corporations whose lines of railway extend over more than one State. It is now settled by the highest authority that a decree of foreclosure and a sale of the entire mortgaged property is valid, although a portion of that property

[1] Wilcocks *v.* Wilcocks, 2 Vern. 558; 2 Lead. Cas. Eq. 345.

[2] *Post*, Part. I., chap. on Implied Trusts.

[3] Adams's Equity 102.

[4] Great Falls Mfg. Co. *v.* Worster, 23 N. H. 462.

[5] Penn *v.* Lord Baltimore, 1 Ves. 444; 2 Lead. Cas. Eq. 767.

[6] Vaughan *v.* Barclay, 6 Whart. 392. To the same effect are Earl of Kildare, *v.* Eustace, 1 Vern. 419; Arglasse *v.* Muschamp, Id. 75; Nabob of Arcot *v.* East India Co., 3 Bro. Ch. 325; Lord Cranstown *v.* Johnstown, 3 Ves. Jr. 170. See also Mitchell *v.* Bunch, 2 Paige Ch. R. 606; and Moore *v.* Jaeger, 2 MacArthur, 465.

[7] Proctor *v.* Ferebee, 1 Ired. Eq. 143; Miller *v.* Sherry, 2 Wall. 241-2; and see same case, pp. 248-9.

may lie out of the territorial jurisdiction of the court making the decree; provided, of course, that the jurisdiction over the defendants in *personam* had properly attached. Such was the ruling of the Supreme Court of the United States in Muller *v.* Dows,[1] where Mr. Justice Strong said: "Without reference to the English chancery decisions, where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognised doctrine that a court of equity, sitting in a State, and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant. True, it cannot send its process into that other State, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of trustees when they are complainants." And so in McElrath *v.* The Pittsburgh and Steubenville Railroad Co.,[2] a bill for foreclosure of a mortgage—in which it appeared that a railroad company, whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the court decreed that the trustee who had brought the suit, being within its jurisdiction, should sell and convey all the mortgaged property, as well that in the State of West Virginia as that in Pennsylvania. But where, in order to the relief sought, it is necessary to deal directly with the land itself, the foreign situation of the property will be a bar to the jurisdiction. Thus, a bill cannot be brought for a partition of land outside of the jurisdiction, for the court cannot issue a commission there.[3]

The maxim that a court of equity acts *in personam* must not be understood to mean that the jurisdiction of the Chancellor extends to rights of action for *personal* injuries. The reverse is the case. The subject of the jurisdiction of courts of equity is *property*—not *persons*. Their *process* is directed against persons, and sometimes against property; but there must be some right

[1] 4 Otto 444.

[2] 5 P. F. Sm. 189. See also White *v.* Hall, 12 Ves. Jr. 321; MacGregor *v.* MacGregor, 9 Iowa, 65.

[3] Smith's Manual of Equity 30. See also Glen *v.* Gibson, 9 Barb. 634; MacGregor *v.* MacGregor, 9 Iowa, 65; and Port Royal R. R. Co. *v.* Hammond, 58 Ga. 523.

of *property* involved in order that the jurisdiction of the court may attach. This subject will be noticed hereafter;[1] but reference may be made, in this connection, to the refusal of courts of chancery to entertain any bill to recover damages for purely *personal* torts.[2]

48. XII. The last maxim which will be noticed is, that equity acts specifically, and not by way of compensation; which embodies a general principle running through the whole system of chancery jurisprudence. This principle is that equity aims at putting parties exactly in the position which they ought to occupy;[3] giving them *in specie* what they are entitled to enjoy; and putting a stop, actually, to injuries which are being inflicted. Thus, equity decrees the performance of a contract, and does not give damages for its breach.[4] So, also, equity will, under certain circumstances, restrain the commission of destructive trespass;[5] whereas at common law all that the aggrieved party could obtain would be a money compensation for the injury. And so, again, a chancellor will sometimes compel a party specifically to make good his representations by which another has been misled; while in the common law action of deceit, damages alone can be recovered.

In some exceptional cases, indeed, equity will afford compensation in lieu of specific relief; but such cases are rare. These exceptions, as well as the general principles contained in this maxim will be illustrated more at length under the appropriate heads of Specific Performance and Injunction.

[1] See end of Chapter II. of Part III., Injunctions, § 465.

[2] See Brown *v.* Wabash Ry. Co., 96 Ill. 297, where a bill filed against receivers for injury resulting in death was dismissed.

[3] "It looks through form to substance;" Texas *v.* Hardenberg, 10 Wallace, 89.

[4] *Post*, Part III., chap. on Specific Performance.

[5] *Post*, Part III., chap. on Injunctions.

PART I.

EQUITABLE TITLES.

CHAPTER I.

TRUSTS; THEIR ORIGIN, HISTORY AND GENERAL NATURE.

49. Definition of Trusts.
50. Distinction between Trusts and *Fidei Commissa.*
51. Origin of Trusts.
52. Trusts before the Statute of Uses; Statute 1 Rich. III., c. 1.
53. Statute of Uses; 27 Hen. VIII., c. 10.
54. General nature of Trusts; Active and Passive Trusts.
55. When trusts will be executed by the Statute; Rules in several States.
56. Lawful and Unlawful Trusts.
57. Executed and Executory Trusts; *Glenorchy* v. *Bosville; Sackville-West* v. *Homesdale.*
58. Reformation of executory instruments creating trusts.
59. Public and Private Trusts.
60. General rules for the devolution of Equitable Estates.
61. Alienation of Equitable Estates; Liability for debts.
62. Exceptions to the general rules of devolution of Equitable Estates.

49. A TRUST, in its technical sense, is the right, enforceable solely in equity, to the beneficial enjoyment of property of which the legal title is in another. The radical idea of a trust is this separate co-existence of the legal title with the beneficial ownership, or as it came to be called, the equitable title. The perfect ownership is, as it were, decomposed into its constituent elements of legal title and beneficial interest, which are vested in different persons at the same time.[1] Thus, to take the simplest case, if land is conveyed or devised to A. on such terms that he is compellable to hold it for the benefit of B., here A. has the legal title, B. has the beneficial ownership, or right to enjoy the land; and this right, originally enforceable solely in equity by suing out a subpœna against A., was considered as attaining the dignity of a *title.*

The length of time during which this separation of the ownership into its constituent elements continues, and the extent of

[1] See the argument in McDonogh's Ex'rs *v.* Murdoch, 15 Howard, 391. See also Chaffees *v.* Risk, 12 Har. 432; Wallace *v.* Wainwright, 6 Norris, 267.

B.'s control over the property, in other words, the *duration* and the *nature* of the trust depend upon the terms by which it is created, subject, of course, to certain established legal rules.

The system of trusts is now so thoroughly recognised, that according to the laws of property in England and in other countries where the English common law is in force, it is one of the rights of ownership that this division of the complete title should, if desired, take place. If the absolute owner of property wishes for any reason to have the equitable title *only* vested in him and the legal title outstanding in another, he has a perfect right to hold and enjoy his property in that way. Nor is it necessary that the *cestui que trust* should be under any disability in order that he may enjoy this privilege. A person *sui juris*, and who is the absolute owner of property, may avail himself of the system of trusts, and may keep the legal title outstanding in another as long as he sees fit so to do.[1]

50. It has been supposed that the English *trust* was identical with, or, at all events, bore a very great resemblance to, the Roman *fidei commissum;* but that there is a broad distinction between the two has been pointed out by high authority. In McDonogh's Executors *v.* Murdoch[2] the question arose whether a "trust" was within the language of the Louisiana code prohibiting *substitutions* and *fidei commissa*, and it was held that it was not. The difference between the two was clearly explained in the opinion of the court in that case,[3] and, indeed, is obvious from a consideration of the nature of the *fidei commissa* as they existed under the Roman law.

The *fidei commissum* was the means of carrying out *substitutions* which could not be otherwise effected by the testator. By a *substitution* a party could be appointed to take the inheritance, in case the person who was designated as heir in the first instance did not make his election to accept the inheritance within a specified time, or in case he was a descendant of the testator, and after becoming heir died under puberty.[4] Thus, the testator could say, "Lucius Titius, be heir and make thy cretion[5]

[1] See the language of Lord Chancellor Cairns in Shropshire Union Railways and Canal Co. *v.* The Queen, L. R. 7 Eng. and Ir. App. 507.

[2] 15 Howard, 367.

[3] Id. 407–409.

[4] Commentaries of Gaius (Abdy & Walker), Book II., §§ 174 to 180; and see McDonogh's Ex'rs *v.* Murdoch, 15 How. 407, 408.

[5] Election, choice.

within the next hundred days after thou hast knowledge and ability. But if thou dost not so make cretion be disinherited, and then Mœvius be heir."[1] And also, "Titius, my son, be my heir. If my son shall not become my heir, or if he become my heir and die before he comes into his new governance, Seius be heir."[2] If, however, a stranger, and not a descendant, was instituted as heir, a substitution could not be made in such a way that if the heir died within a specified time some other person should be heir to him. But this end was effected by means of the *fidei commissum*,[3] whereby the heir was bound to deliver over the inheritance either in whole or in part, at or after a designated time.[4] In other words, the *fidei commissa* were the means whereby the transmission of estates, to be enjoyed by successive owners, was secured.[5] The performance of the *fidei commissa* was enforced at Rome by the consul or the prætor whose special jurisdiction was over *fidei commissa*, and in the provinces by the governor.[6] Subsequently a prætor was appointed for the special purpose of hearing such causes, receiving, from the nature of his duty, the name of *prætor fidei commissarius*.[7]

It is true that in both the Roman *fidei commissa* and English trusts, a confidential relationship was presumed to exist;[8] but in the former it was called into being for the purpose of transmitting the inheritance; in the latter, in order to regulate the present enjoyment of the estate.[9]

The fundamental idea, moreover, which lay at the root of both trusts and *fidei commissa* was probably the same, viz., that under certain circumstances it might be convenient or desirable that one man should take and hold property, the benefit of which was sooner or later to accrue to another; but the development of this idea, in the two systems of jurisprudence, was essentially different.

The distinction, therefore, which it is desirable to remember as existing between the *fidei commissum* and the trust is this,

[1] Com. of Gaius, *ut sup.*

[2] Id. § 179.

[3] Id. § 184.

[4] Id. §§ 184, 246 to 289.

[5] Resembling, in this particular, the system of estates tail in the English law.

[6] Gaius, Book II., § 278.

[7] Justinian, Lib. II., Tit. xxiii., §§ 1 and 2.

[8] Amos on the Science of Jurisprudence, 91.

[9] A trust to convey an estate to another would bear a near resemblance to a *fidei commissum*.

that in the former there was no separation of the legal and equitable title, but there was simply a request, which afterwards became a duty imposed upon the *gravatus*, to convey the inheritance to another person, either immediately or after a certain event, *e. g.*, the death of the first taker; whereas, in the trust, the perfect ownership is decomposed into its constituent elements of legal title and beneficial interest, which are vested in different persons at the same time.

It may also be here remarked that the *fidei commissa* arose out of testamentary dispositions; whereas, English trusts were originally created only by conveyances *inter vivos*, land not being devisable before the statute of Henry VIII.

It may further be observed that the *usus* and *usufructus* of the Roman law are not to be confounded with the English use or trust. The *usus* in the Roman law of property consisted in the right to the natural use of a thing, owned by another, by some definite individual, and the family circle of which he constituted the head, and was ordinarily not transferable. The usufructus was of greater extent than the usus, there being added to the latter the *fructus* or a right to enjoy the fruits of land to a greater extent than is necessary for daily consumption; and this right could be let, sold, or given to another.[1]

51. When it was exactly that the idea of the separation of the complete ownership into the legal and equitable titles first made its appearance in England, is, perhaps, impossible to say; nor can it be asserted with any certainty whether this idea was one of purely English growth, or whether it was imported from some other system of laws. The probabilities are in favor of its indigenous nature; for, as we have seen, it has no exact counterpart in the Roman law;[2] nor is it likely that the English lawyers of very early times had opportunities of studying this law, if any such ideas could indeed have been gathered from it.[3]

[1] See Justinian's Institutes, Lib. II., Tit. IV. and V. Tompkins and Jenkyn's Modern Roman Law, 173, 174.

[2] See the opinion of Judge Campbell in McDonogh's Executors *v.* Murdoch, 15 Howard, 409.

[3] The tendency in modern times is, perhaps, to exaggerate the extent to which the early English law is indebted to the Roman law. Points of resemblance nearly always exist between all systems of jurisprudence; and, therefore, it should not be hastily inferred that the rules of one system were borrowed from another. The Roman law which influenced the English law was probably the early Roman law—not the law of Justinian.

In early times, the idea of the separation of the legal and equitable titles must have met with an enemy in the feudal system. To allow a feud to be held by one person in trust for another, would have created confusion in determining to whom the lord was to look for the performance of the services annexed to the feud, and for those pecuniary and other advantages which he derived from the death of the feudatory, or the alienation of the estate. Hence, Mr. Butler has regarded the introduction of uses as one of the most effective blows aimed at the feudal system.[1]

Some attempts, indeed, have been made to show that trusts existed in the reign of King Alfred; but the better opinion seems to be that the instance referred to was the description of a tenure, and not the case of a trust.[2] The probabilities are, that trusts were recognised before the statute of *quia emptores* (13 Edw. I.), and became frequent after that date; this probability being founded on authority,[3] and being further strengthened by the fact alluded to by Mr. Finlason, that we not unfrequently fall into error when we assume that "because proceedings are not mentioned as being judicially decided upon, they did not exist."

Without, however, entering into any elaborate research, it may be safely assumed that in the reign of Edward III., the beneficial enjoyment of land as distinguished from the legal ownership was distinctly recognised;[4] and it now becomes necessary to trace briefly the nature of this beneficial interest, its development into that permanent equitable estate known as a use, the nature of this estate prior to the famous statute of uses of 27 Henry VIII.; the effect of that statute, and the character of the equitable interests which it left untouched, and which together with certain other like interests, under the title of the modern trusts, fell peculiarly under the jurisdiction of the Court of Chancery.[5]

52. Before the statute of uses there appears to have existed a

[1] Co Litt. 191, a, note, sec. VI. 11.

[2] Saunders, U. and T. 7.

[3] See reference to Bro. Abr. tit. "Feoffmental Uses," in Reeves's Hist. Eng. L., vol. 2, p. 575, note (Finlason); and 1 Spence Eq. 439, note f; 447.

[4] In the Statute 50 Edw. III., c. 6, the taking the profits by one where the estate at law is in another is recognised; and in 7 Rich. II., c. 12. the word use (*oeps*) is first mentioned. Bacon, 23, 25; 1 Spence Eq. 440.

[5] See Perry on Trusts, § 300.

distinction between the technical "use" and a "trust." "When a trust," says Bacon,[1] "is not special nor transitory, but general and permanent, there it is a use." The permanent "use" was the natural result and outgrowth of the "special trust." Two classes of beneficial interests consequently arose.[2] First, the use or simple trust, of which it is said "it is not like a rent out of the land, but is like a collateral thing annexed to the person touching the land; and it is but a confidence for the usage of land, that is to say, a confidence that the feoffees to whom the land has been given shall permit the feoffor and his heirs, and those whom they should designate to receive the profits of the land, and that the feoffees should make such estates of the land as they (the feoffors) should limit, and so their estate is but a confidence."[3] Second, the special trust: which was subdivided into the "special trust lawful," as if a man had enfeoffed another to the intent or in trust to be re-enfeoffed, or to the intent to be vouched, or to the intent to suffer a recovery; and the special trust unlawful, or covinous trust, as a trust to defraud creditors, or for maintenance, for defeating the tenancy to the præcipe, the statutes of mortmain, or the wardship of lords.

The courts of common law took no cognisance of these equitable interests, and the only remedy which the beneficiary enjoyed was by means of a subpœna out of chancery.[4] Trusts of both descriptions had their origin either in fraud or fear.[5]

[1] Essay on Uses, 9. See also Hutchins *v.* Heywood, 50 N. Hamp. 497.

[2] See Sanders, Uses and Trusts, 6; Lewin on Trusts, 2; 1 Spence Eq. 448.

[3] Dellamere's Case, Plowden, 345 *a*; Co. Litt. 272 *b*.

[4] "A trust," said Lord Hardwicke, "is where there is such a confidence between parties that no action at law will lie:" Sturt *v.* Mellish, 2 Atk. 612. See also Allen *v.* Imlett, Holt, 641; Vanderstegen *v.* Witham, 6 M. & W. 457; Bond *v.* Nurse, 10 Q. B. 244; Edwards *v.* Lowndes, 1 El. & Bl. 81: Millard's Case, 2 Freem. 43. Nor had the spiritual courts any jurisdiction. See Witter *v.* Witter, 3 P. Wms. 102; King *v.* Jenkins, 3 Dow. & R. 41; Edwards *v.* Graves, Hob. 265; Farrington *v.* Knightly, 1 P. Wms. 549. See further on the subject McCartney *v.* Bostwick, 32 N. Y. 53; Dorsey *v.* Garey, 30 Md. 489; Green *v.* Johnson, 3 Gill. & J. 389; Denton *v.* Denton, 17 Maryl. 407. In Pennsylvania, the *cestui que trust* may enforce the right to the *possession* of real estate, even as against the trustee, by an action of ejectment; Kennedy *v.* Fury, 1 Dall. 76; Presb. Cong. *v.* Johnston, 1 W. & S. 56; School *v.* Dunkelberger, 6 Barr, 29; Perry on Trusts, § 17.

[5] See the argument of Sir Robert Atkyns in Att. Gen. *v.* Sands, Hard. 491. "Trusts and uses," he said, "have the same parents, fraud and fear; and the same nurse, a court of conscience."

In fraud, for they were designed originally by ecclesiastics for the purpose of evading the statutes of mortmain, and were subsequently made use of in order to effectuate some covinous intent on the part of the feoffee, such as to defraud a lord of his wardship or creditors of their remedy for their debts; in fear, for the effectiveness of this method of defeating strictly legal rights, was soon readily taken advantage of during the disputes between the Houses of York and Lancaster, which began with Bolingbroke's usurpation in the reign of Richard II., in order to avoid the forfeitures with which the alternately successful parties visited the estates of their adversaries. Uses and special trusts, therefore, grew into a system, and they came to be governed by well-established principles. As beneficial interests rested solely upon the conscience of the feoffee, corporations were held not to be capable of a seisin to use, for they had no *souls*.[1] The king or queen could not be a feoffee to uses, for it was thought inconsistent with the royal dignity that such a confidence should be enforced against a sovereign at the suit of a subject. Hence, when the Duke of Gloucester, to whom many estates had been conveyed in trust, acquired the crown, a special statute was passed in order to remedy the mischief which would otherwise have arisen from the incapacity of enforcing trusts as against the king.[2]

In addition to *confidence of person, privity of estate* was also necessary. No person could be seised to a use who was not *in* of the same estate as that of which the use had been declared. All persons who came in by title paramount, all persons who were *in* in the *post* and not in the *per*, took the estate free of the use. Such was the lord who was in by escheat, or a tenant by the curtesy. So also a disseisor, abator, or intruder.[3]

A consideration was necessary to raise a use where the convey-

[1] Sanders, 57–87; Jenkins, 195.

[2] Stat. 1 Ric. III., c. 5. See Hodge *v.* Att. Gen., 3 Young. & Col. 342.

But in later times it seems to have been thought that there could be a "royal trustee," subject to the practical difficulty of enforcing a trust against a monarch. See Penn *v.* Lord Baltimore, 1 Ves. Sr. 453; Earl of Kildare *v.* Eustace, 1 Vern. 439, note 1; Perry on Trusts, § 40. See particularly Briggs *v.* Light-boats, 11 Allen, 157, where the authorities upon the subject of the sovereign's immunity from suit are collected. See also Prioleau *v.* United States, L. R. 2 Eq. 659; and New *v.* Bonaker, L. R. 4 Eq. 655.

[3] Sanders, 55, 61, 62; 1 Spence Eq. 445.

ance was one which did not *operate by transmutation of possession;* and no use could be raised either of personal inheritances, such as annuities, or of things *quæ ipso usu consumuntur*, such as commons or ways in gross.

While the feoffee to uses was, in the eye of the law, the real owner, the *cestui que use* could exercise many acts of ownership over the use which no holder of a legal title could enjoy over land itself. He could devise it, he could alien it,[1] and it descended according to the rules of common law in respect to inheritances of land. His right to the land, however, was a mere *chose in action*, a mere right to sue out a subpœna in chancery, and it was liable to be defeated by the alienation of the holder of the legal title. It was subject to the feudal duties of the feoffee to uses, and to the dower of his wife, and to the danger of being forfeited for his treason or felony; and it could not, originally, be enforced against his heir.[2]

In the reign of Richard III. a very important statute[3] was passed affecting the rights and powers of the *cestui que use.* That statute, after reciting the mischiefs growing out of unknown and privy feoffments, provided in substance that the *cestui que use* should have the power of alienating not only the use but the possession also, or, in other words, that an alienation by the *cestui que use* should "have the same effect as if he had the legal ownership."

It has been argued by Mr. Sanders that prior to the statute of Richard III. it had been determined that on a feoffment for life or in tail, or a grant for a term of years, there could be no declaration of a use, and that a subpœna would not lie against a person so seised, the reason being "that as to the estate or seisin of a tenant in tail no use could be limited upon it; first, because the tenure of itself created a valuable consideration; and, secondly, because the statute *de donis* had appropriated and fixed the estate tail to the donee and the heirs of his body, so that neither he nor they could execute the use;" and as to the tenant for life, "the consideration of tenure between the lessor and

[1] But subpœna was not assignable in a case of a bare trust and confidence. See Bacon, Uses, note to p. 16, Rowe's edition. See Moyle Finch's Case, 4 Inst. 86.

[2] Sanders, 67; 1 Spence Eq. 445.

[3] 1 Ric. III., c. 1.

lessee appears to have been incompatible with the use;"[1] while as to the interest of a termor "it was supposed that the contract between the lessor and lessee, and the consideration upon which the latter took the lease, were incompatible with and repugnant to the nature of a use declared to any other person."

The point is not of any great practical importance, except as illustrating the gradual extension of equitable interests to all degrees of estates, for the statute of Henry VIII. included uses declared upon the seisin of a tenant for life (showing their existence at that time); and courts of equity, after the passage of that statute, began to enforce confidences declared upon terms for years, not as the old-fashioned uses, but as trusts.[2]

The point is also of importance as showing the true nature and extent of a *trust*, for, the definition sometimes given of a trust, viz., that it is a use not executed by the statute of Henry VIII.,[3] is too limited, if *use* is employed in its strict technical sense.

The modern trust includes not only those technical *uses* which were not executed by the statute, but also equitable interests which never were considered uses,[4] and did not, therefore, fall within the provision of the statute. These equitable interests, in common with the unexecuted uses, received the name of trusts.[5] It may be remembered here that the term "trust" did not include every interest in land recognised in the Court of Chancery. The equity of redemption of a mortgagor, for example, was an equitable interest analogous to a trust, but nevertheless distinct and different from it.[6]

To return to the statute of Richard III.; a difficulty arose which seems not to have been foreseen, viz., that while the

[1] Sanders U. & T. 28. It will be observed that this argument has no application where the life estate was not *created* but merely *transferred* by the conveyance. See Lewin, 6; 1 Cruise Real. Prop. 350.

[2] See Sanders, U. & T. 32.

[3] 1 Cruise Real Prop. 380; Perry on Trusts. § 300. See also The King and Holland, Styl. 40.

[4] Sanders U. & T. 32.

[5] "In modern times trust estates are extremely analogous to uses before the statute of uses. *I do not say they are always exactly the same.*" See Lord Cranworth in Penny *v.* Allen, 7 DeG. M. & G. 422.

[6] Sanders, U. & T. 279; Tucker *v.* Thurstan, 17 Ves. 133. "Trusts were not on a true foundation until Lord Nottingham held the great seal:" Burgess *v.* Wheate, 1 Eden, 223; Philips *v.* Brydges, 3 Ves. 127; Kemp *v.* Kemp 5 Ves. 858; Perry, § 8.

power of alienation was conferred upon the *cestui que use*, no restraint was imposed upon the like power which already existed in the feoffee to uses. Hence if a conveyance were made by the latter, *his* alienee might and did interfere with the enjoyment of the alienee of the *cestui que use*. This highly unsatisfactory condition of titles led, among other things, to the enactment of the famous statute of uses, 27 Henry VIII., c. 10.

53. The provisions of this statute are well known. It enacted, in substance, that wherever any person, by any assurance, stood seized to the use of another for any estate the *cestui que use* should be deemed to be in lawful seizin and possession of the same estate in the land itself as he had in the use. In the language of conveyancing, it transferred the use into a possession, or executed the use. Its objects, according to the preamble, was "for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses and errors heretofore used and accustomed in this realm, * * * and to the intent that the king's highness or any other his subject of this realm shall not in any wise hereafter, by any means or inventions, be deceived, damaged or hurt by reason of such trusts, uses and confidences;" and in addition to conferring upon the *cestui que use* the legal title to, and the possession of the land, it gave him the power to protect his possession by action or entry against any person "for any waste, disseizin, trespass, condition broken, or any other offence" touching the same.

Besides this statute, Parliament in the same year passed another act for the purpose of putting a stop to secret conveyances. This was the statute for "enrolment of bargains and sales,"[1] which provided for the registration of all bargains and sales of land whereby any estate of inheritance or freehold should be made to take effect in any person, or any use of the same should be made.

The objects, however, which these statutes professed to have in view were soon defeated.

The statute in regard to bargains and sales provided only for the enrolment of such deeds as attempted to pass freehold estates, and did not apply to terms for years. Hence arose the

[1] 27 Henry VIII., c. 16.

well-known system of conveyance by lease and release, whereby a lease for a year was made, by bargain and sale, and the lessee being then in possession by virtue of the statute of uses, became capable of receiving a release of the fee.[1]

The construction placed upon the statutes of uses, also, limited its operation to a great degree.

It was considered that copyholds did not fall within the purview of the statute, because it was against the nature of copyhold tenure, that any one should be introduced into the estate without the consent of the lord.[2] It was decided that a use limited upon a use was not executed by the statute;[3] or, in other words, that the statute acted but once in the same conveyance; and by this means a statute "made upon great consideration, introduced in a solemn and pompous manner," by this strict construction, has had no other effect than to add at most three words to a conveyance.[4] It was also held that where the feoffee to uses was to convey the land, or to collect and pay over the profits, the use was not executed.[5] The uses which were not executed by the statute have been grouped by Mr. Sanders into six classes as follows: 1. Contingent uses, which are not exe-

[1] See Hurst's Lessee *v.* McNeil, 1 Wash. C. C. 74.

[2] Gilbert's Tenures, 170; Co. Litt. 272, a; Butler's Notes, § viii. 2.

[3] *Home no poet vender terre al J. S. al use le vendor, ne lesser terre al luy rendrant rent, habend al use del lessor, car ces est contrarie al ley et reason, car il ad recompence pur ceo.* 36 Hen. VIII., B. N. C. 284. This was the decision of the common-law courts, so that the statute of uses does not seem to have been very popular. Tyrrel's Case, Dyer, 155 a; Doe *dem.* Lloyd *v.* Passingham, 6 Barn. & Cres. 305; Sanders, 276; Reid *v.* Cordon, 36 Maryl. 183; Croxall *v.* Shererd, 5 Wal. 268; Matthews *v.* Ward, 10 Gill. & Johns. 443; Perry on Trusts, § 6. See also Smith *v.* Oliver, 11 S. & R. 257, where it was held that a trust could not exist as to a mere improvement right which was simply an equity against the Commonwealth.

The rule stated in the text was of great practical importance in the method of conveyance known as *bargain and sale.* By a bargain and sale the vendor of the land by force of the pecuniary consideration of the contract became seised to the use of the vendee, and it was that use, so created, that the statute executed into a legal estate in the vendee. Hence, as under the above rule the statute never acted but once in the same conveyance, it followed that all the limitations ulterior to that of the conveyance were unexecuted; in other words, were *trusts.* See Matthews *v.* Ward, 10 Gill. & Johns. 444; Preston on Conveyancing, 482, 483.

[4] Hopkins *v.* Hopkins, 1 Atk. 591.

[5] Sanders, 253.

cuted during the suspense of the contingency; 2. Uses limited of copyhold lands; 3. Devises to uses;[1] 4. Active trusts, such as to pay over profits, convey, or sell, or to preserve contingent remainders;[2] 5. Uses limited of chattel interests; 6. A use upon a use.[3] Probably, however, all the classes into which the uses which survived the statute have been divided, may be classified under two general heads: *first*, those uses which, though falling within the terms of the statute, were released from its operation by the construction put upon it by the courts, of which the use upon a use is an example; and *secondly*, those uses which did not fall within the language of the statute, such as uses of chattel interests.[4] Whatever subdivision, however, may be suggested by the convenience or fancy of authors, all of these equitable interests, now under consideration, may be treated as embraced in the one great family of modern trusts, the origin of which having been noticed, it will now be proper to proceed to the consideration of their different kinds, their manner of creation, and the purposes for which they are ordinarily called into existence.

54. Trusts in respect of the general nature of the duties of trustees, and the object for which the trust is created, may be divided into active and passive, lawful and unlawful, executed and executory, private and public.

An active or special trust scarcely requires definition. It exists when a trustee has certain duties to perform which render it necessary, for the purposes of the trust, that the legal title should remain in him. When this is the case the *cestui que trust* is entitled only to the beneficial interest, and cannot call upon the trustee to convey. For example: where there is a trust for the payment of debts, the trustee must necessarily have the legal title of the trust property in him in order to get in the assets, turn them into cash, and discharge the liabilities. The creditors whose debts are to be paid have, therefore, no right to the

[1] Though as to this, see Doe *dem.* Cooper *v.* Finch, 4 Barn. & Ad. 305.

[2] Kay *v.* Scates, 1 Wright, 37.

[3] Sanders on Uses, 240 *et seq.*

[4] After the passage of the statute of uses interests in land were therefore of three kinds—(1) the common-law (or legal) fee; (2) the use; (3) the trust. See Willett *v.* Sandford, 1 Ves. 186; Coryton *v.* Helyar, 2 Cox, 342; Perry on Trusts, § 7.

legal title of the property or to its possession. They have simply an interest, which a court of equity will protect, in seeing that the trust is properly carried out.

A passive (or, as it is sometimes called, a simple) trust has been defined to be a trust in which the property is vested in one person upon trust for another, and the nature of the trust, not being qualified by the settlor, is left to the construction of the law. In this case the *cestui que trust* has *jus habendi*, or right to be put in actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs.[1]

55. A trust, which at the time of its creation is a simple or passive trust, will be executed by the statute of uses, the mere circumstance that the word "trust" is used instead of the word "use" making no difference.[2] But where a trust which has been once active becomes passive, or where for any reason the trustee becomes the holder of a mere dry legal estate, such a trust is not necessarily executed by the statute, but the legal title may remain in the dry trustee.[3] If the mere fact that the trustee had active duties to perform was the only circumstance that had prevented the statute from operating, the trust will be executed when the active duties have ceased.[4] But if the non-execution of the trust by the statute did not originally and solely depend upon the activity of the trust, the fact that the trust has ceased to be active will not of itself cause the statute to apply.[5] Under such circumstances, however, the trustee is bound to convey the legal title at the request of the *cestui que trust*;[6] and after a great lapse of time, and in support of long-continued possession on the part of the person holding the beneficial interest, such conveyance will be presumed.[7]

[1] Lewin, 21.

[2] Austen *v.* Taylor, 1 Eden, 361; Lewin on Trusts (4th ed.), 161.

[3] Hill on Trustees, 316.

[4] See Perry on Trusts, § 351; Welles *v.* Castles, 3 Gray, 323; Liptrot *v.* Holmes, 1 Kelly, (Ga.) 381.

[5] See Perry on Trusts, § 351.

[6] Hill on Trustees, 316; Leonard's Lessee *v.* Diamond, 31 Maryl. 541; Sherman *v.* Dodge, 28 Verm. 30; see Healey *v.* Alston, 25 Miss. 192.

[7] Leonard's Lessee *v.* Diamond, 31 Maryl. 541–542; Matthews *v.* Ward, 10 Gill & Johns. 443; Jackson *v.* Pierce, 2 Johns. 226; Aitken *v.* Smith, 1 Sneed. 304; Den *ex dem.* Obert *v.* Bordine, Spencer Rep. (N. J.) 389; Hill on Trustees, 253.

Even if the purposes of the trust have not been all accomplished, or the trust may not have ceased by expiration of time, yet if all the *cestuis que trustent* are in existence and *sui juris*, and consent thereto, the courts may decree the determination of the trust and a distribution of the trust-fund among those entitled.[1]

In Pennsylvania the courts have departed from the English doctrine in two particulars: first, in regarding some trusts *not* to be active which in England would have been so considered; and, secondly, in holding that, in passive trusts, the use was executed by the statute in cases in which in England the ruling would have been different. "Many trusts," it has been said,[2] "which would be classed as active ones in England would be regarded here (in Pennsylvania) as passive, as, for example, the distinction between the trust to receive and pay and one to permit and suffer the *cestui que trust* to receive is not recognised." Indeed, this doctrine was at one time pushed to great lengths; and it was held in Kuhn *v.* Newman,[3] and some other cases,[4] that *equitable* were converted into *legal* estates in all cases except those of active trusts, and even *then* when the purposes of the trust did not furnish any legitimate reason for preserving it from being executed in the beneficiary. This extreme position was, however, subsequently abandoned, and the cases just cited overruled;[5] and the law is now held to be that where an active trust is created to give effect to a well-defined lawful purpose, the trust must be sustained whether the *cestui que trust* be *sui juris* or not.[6] And even if the special purpose of the trust fails, it has been held that, where the duties of the trustee and

[1] Smith *v.* Harrington, 4 Allen, 576; Bowditch *v.* Andrew, 8 Id. 339; Culbertson's Appeal, 26 P. F. Sm. 148; Perry on Trusts, §§ 274, 922.

[2] In Rife *v.* Geyer, 9 P. F. Sm. 396. See Philadelphia Trust Co.'s Appeal, 9 W. N. C. 289.

[3] 2 Casey, 227.

[4] Whichcote *v.* Lyle's Ex'rs, 4 Casey, 73; Bush's Appeal, 9 Id. 85; see also Williams *v.* Leech, 4 Id. 89; Price *v.* Taylor, Id. 95; Naglee's Appeal, 9 Id. 89; McKee *v.* McKinley, Id. 92; Kay *v.* Scates, 1 Wright, 31.

[5] Barnett's Appeal, 10 Wright, 392; Shankland's Appeal, 11 Id. 113; Wickham *v.* Berry, 5 P. F. Sm. 71.

[6] Williams's Appeals, 2 Norris, 377; Phillips's Appeal, 30 P. F. Sm. 472; Earp's Appeal, 25 Id. 119; Huber's Appeal, 30 Id. 348; Ashhurst's Appeal, 27 Id. 464; Deibert's Appeal, 28 Id. 297; Keene's Est., 31 Id. 133. See Parker's Appeal, 11 Id. 478.

the instrument creating the trust are of such a character that an ulterior purpose for maintaining the trust is sufficiently evinced, the trust will be supported.[1]

But when the special purpose of the trust has been determined, and no general intention to establish a continuing trust outside the special purpose appears, the trust will fall. Thus, when a trust for the sole and separate use of a married woman has been created, and the trust is one for coverture merely, and the feme subsequently becomes discovert, the trust will be treated as executed, or, if necessary to make the title marketable, the trustee will be decreed to convey.[2] Nor is the trust preserved by the mere circumstance that the machinery of an active trust has been created if, in point of fact, the object for which that machinery was designed has failed. "The mere form of words," it has been said,[3] "importing an active trust does not sustain the trust if the purpose of its creation should fail." And in Ogden's Appeal[4] it was said by the same judge: "The trust for coverture, not being in immediate contemplation of marriage, never took effect, and the active duties having sole reference to this supposed trust necessarily fell with it. An active trust, having no object to accomplish for the benefit of the *cestui que trust*, clearly will not be continued for the mere benefit or pleasure of the trustee. The object of the testator having failed or ceased, the law will execute the use."

The other departure of the Pennsylvania doctrine from the English rule is that, in some cases where in England the trust would not be executed (*e. g.*, where there is a mere trust to convey[5]), the severance of the legal and equitable titles will not be considered to exist, and the legal fee will be treated as having passed to the beneficial owner.[6] "It is true that we have in some cases decreed conveyances from a trustee to a *cestui que trust*

[1] Bacon's Appeal, 7 P. F. Sm. 512; Dunn & Biddle's Appeal, 4 W. N. C. 408; Ash's Appeal, 30 P. F. Sm. 497; Deibert's Appeal, 2 Norris, 462; Fidelity Ins. Co.'s Appeal, 35 Leg. Int. 203; Ingersoll's Appeal, 5 Norris, 240; Livezey's Appeal, 106 Pa. St. 201.

[2] Dodson *v.* Ball, 10 P. F. Sm. 492.

[3] In Yarnall's Appeal, 20 P. F. S. 339. To the same effect is Kœnig's Appeal, 7 Id. 352.

[4] 20 P. F. Sm. 501. The same ruling was also made in Williams's Appeals, 2 Norris, 377, 390.

[5] See Yarnall's Appeal, 20 P. F. Sm. 335; Barnett's Appeal, 10 Wright, 392; Nice's Appeal, 14 Id. 143.

[6] Bacon's Appeal, 7 P. F. Sm. 504.

when the purpose of the trust has been fulfilled, but this was not because the legal and equitable titles remained apart. It was to dissipate a useless cloud upon the title and to make the property more marketable."[1]

And in Rife *v.* Geyer[2] it was said that, in Pennsylvania, "whenever the entire beneficial interest is in the *cestui que trust* without restriction as to the enjoyment of it, there is no reason why it should not be considered as actually executed. No formal conveyance of the legal estate is necessary, though it will be decreed, because the nominal trust beclouds the title and embarrasses the rights of alienation which belong to the true owner."[3]

The return of trusts into favor, as shown by Barnett's Appeal[4] and Shankland's Appeal,[5] is further illustrated by subsequent cases, cited in the note, in which the trusts were upheld.[6] These last-mentioned cases are illustrations of that portion of the rule, just mentioned, which has relation to the quantity of the estate vested in the beneficiary. When the *entire* beneficial interest is vested in the beneficiary, and the trust has become a simple or passive one, the use will be considered as executed, or (if needful for the marketability of the title) the trustee will be decreed to convey. But where the estate of the beneficiary is but partial, the same rule does not apply, and the trust will be sustained.[7]

The Pennsylvania decisions upon this subject have been noticed with some particularity, as in them the distinctions between active and passive trusts, and between those which are and those which are not executed by the statute, have been,

[1] Bacon's Appeal (*supra*).

[2] 9 P. F. Sm. 396.

[3] See also Kay *v.* Scates, 1 Wright, 40; Megargee *v.* Naglee, 14 P. F. Sm. 216; Kuhn *v.* Newman, 2 Casey, 227; Rush *v.* Lewis, 9 Harris, 72; Bush's Appeal, 9 Casey, 85; Bacon's Appeal, 7 P. F. Sm. 504; Rife *v.* Geyer, 9 Id. 393; Freyvogle *v.* Hughes, 6 Id. 228; Westcott *v.* Edmunds, 18 Id. 37; Tucker's Appeal, 25 Id. 354. See, also, in this connection, Hays *v.* Tabor, 41 N. Hamp. 521. Reference may also be had to Roberts *v.* Moseley, 51 Missouri, 282, where it was held that, on the death of a feme covert, the separate use will be considered as executed without the necessity of a conveyance.

[4] 10 Wright, 392.

[5] 11 Id. 113.

[6] Earp's Appeal, 25 P.F. Smith, 119; Ashhurst's Appeal, 27 Id. 464.

[7] See Earp's Appeal, Ashhurst's Appeal (*supra*).

perhaps, more frequently investigated than elsewhere; and the fluctuations of opinion which have taken place upon the subject have furnished an episode in the history of trusts which it is useful to study.

At one time no court possessed of equity powers existed in Massachusetts. It was accordingly held, while the law was in that condition, that a trust should be treated as a use executed, unless such a construction would be repugnant to the manifest intention of the instrument.[1] It will be remembered, however, that the courts of that State now have equity powers.[2]

In some States, as in New York, Michigan, Louisiana, and Wisconsin, trusts have been abolished, except within very narrow limits.[3] In the State last named, however, it has been held that passive trusts only were abolished by the statute, and that active trusts may still be created.[4]

The provisions of the statute of uses, and the construction put upon that act, have been already explained.[5] In nearly all of the United States this statute is in force, or its provisions have been adopted by legislative enactments.[6] The only exceptions to this rule appear to be Vermont,[7] Tennessee, and Ohio,[8] and, to a limited extent, Virginia, North Carolina, Florida, Mississippi, Kentucky, Illinois and California.[9] Even in some States where the statute is not in force, and has not been applied, uses are executed by a sort of common law.[10] This theory was indeed pushed to great lengths in Pennsylvania, where (as has been already stated) it was at one time held that *equitable* were converted into legal estates in all cases except those of active

[1] Norton *v.* Leonard, 12 Pickering, 157.

[2] *Ante*, p. 25, note.

[3] See Voorhees *v.* Presbyterian Ch., 17 Barb. 103.

[4] Goodrich *v.* The City of Milwaukee, 24 Wis. 429.

[5] *Ante*, pp. 77, 78.

[6] See Perry on Trusts, § 299, note, for a detailed statement of the statutes and decisions in the different States; also Hill on Trustees, 230, note. See, also, French *v.* French, 3 N. H. 234; New Parish *v.* Odiorne, 1 N. H. 236; Witham *v.* Brooner, 63 Ill. 344, and Hutchins *v.* Heywood, 50 N. Hamp. 497.

[7] Gorham *v.* Daniels, 23 Verm. 600.

[8] Helfenstine *v.* Garrard, 7 Ohio, 276.

[9] Perry on Trusts, § 299.

[10] Bacon *v.* Taylor, Kirby, 368; Bryan *v.* Bradley, 16 Conn. 483; Coughlin *v.* Seago, 53 Georgia, 250; Sherman *v.* Dodge, 28 Verm. 31; Society for Propagation of the Gospel *v.* Town of Hartland, 2 Paine C. C. 539; Guest *v.* Farley, 19 Missouri, 149. See Bowman *v.* Long, 26 Ga. 147; Adams *v.* Guerard, 29 Id. 651; and McNab *v.* Young, 81 Ill. 14.

trusts, and even *then* when the purposes of the trust did not furnish any legitimate reason for preserving it from being executed in the beneficiary.[1] But this extreme position was subsequently abandoned by the courts, and the law restored to its former basis.[2]

The general tendency of the American courts is, perhaps, to give a very liberal effect to the statute of uses and the kindred acts. Thus the strict rule adopted in Tyrrel's case, that a use limited upon a use will not be executed, has been disapproved in Massachusetts;[3] and it has been doubted by a learned author whether the rule in Tyrrel's case is to be regarded as a rule of construction in all or any of the United States.[4] But in some States the rule in Tyrrel's case is adhered to. Thus in Guest *v.* Farley,[5] it was distinctly decided that where a use was limited upon a deed of bargain and sale, it was not executed by the statute, even though the consideration moved from the *cestui que use.*

It must be remembered that the statute of uses did not extend to personalty; and this is perhaps the general rule throughout the United States, although the subject is, of course, regulated by the language of the particular statute in each State.[6]

When active duties are to be performed by the trustee, the rule in the United States is generally the same as in England and the trust will not be executed.[7]

[1] Kuhn *v.* Newman, 2 Casey, 227; Whichcote *v.* Lyle's Ex'rs, 4 Id. 73; Bush's Appeal, 9 Id. 85. See, also, Williams *v.* Leech, 4 Id. 89; Price *v.* Taylor, Id. 95; Naylor's Appeal, 9 Id. 89; McKee *v.* McKinley, Id. 92; Kay *v.* Scates, 1 Wright, 31.

[2] Barnett's Appeal, 10 Wright, 392; Shankland's Appeal, 11 Id. 113. See, also, Bacon's Appeal, 7 P. F. Sm. 504. In Ogden's Appeal, 20 P. F. Sm. 501, there was a trust for the sole and separate use of a *feme sole* not in contemplation of marriage; and it was held, that, as the separate use was void, the trust fell to the ground in spite of the fact that the trustees had active duties to perform. Consult, also, Yarnell's Appeal, 20 P. F. Sm. 335; Dodson *v.* Ball, 10 Id. 492; Tucker's Appeal, 25 Id. 354; and Megargee *v.* Naglee, 14 Id. 216.

[3] Per Dana, C. J., in Thatcher *v.* Omans, 3 Pick. 528.

[4] 1 Greanleaf's Cruise on Real Prop. 353, note. Perry on Trusts, § 302.

[5] 19 Missouri, 147. See, also, Price *v.* Sisson, 2 Beas. 173; Croxall *v.* Shererd, 5 Wallace 282; Jackson *v.* Myers, 3 Johns. 396; and Jackson *v.* Cary, 16 Id. 302.

[6] Denton *v.* Denton, 17 Maryl. 403; Slevin *v.* Brown, 32 Missouri, 176; Rice *v.* Burnett, 1 Speer's Eq. Rep. 586; Jow *v.* Hodges, Id. 599. Perry on Trusts, § 303.

[7] Stanley *v.* Colt, 5 Wallace, 119, 168; Leggett *v.* Perkins, 2 Comst. 297;

56. Trusts may either be *lawful* or *unlawful*. A lawful trust is one which is created for some fair and honest purpose recognised by law; such as for the payment of debts, for a married woman, for a proper charity, or the like. Trusts are unlawful when they are created for some object which is in contravention of public policy, or in violation of statutes. Thus a trust for a vicious or immoral purpose would be void at common law, because it is against public propriety and policy. So trusts in violation of the statutes of mortmain, of the statutes in regard to aliens, or of the law against accumulation, or the creation of perpetuities, are also bad.[1] Equity, while it creates a new title, viz., the trust, will not uphold it for the purpose of violating the law.[2]

57. Trusts are also either *executed* or *executory*. These terms have been already defined.[3] The test, according to Lord St. Leonards, is this: Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is; or has he so defined that intention that you have nothing to do but to take that which he has given to you and to convert them into legal estates?[4]

In an executed trust the instrument must be interpreted according to the rules of law, which are, in general, the same for equitable as for legal estates, although by such interpretation the *intention* may be defeated. Thus, if an estate is given to A. and his heirs, in trust for B., for life, with remainder to the heirs

Morton *v.* Barrett, 22 Maine, 261; Exeter *v.* Odiorne, 1 New Hamp. 232; Ashhurst *v.* Given, 5 W. & S. 327; Chapin *v.* Universalist Soc., 8 Gray, 580. A trust to "permit and suffer" the *cestui que trust* to receive the rents and profits of an estate is not an active trust. Wagstaff *v.* Smith, 9 Ves. 520; Perry on Trusts, § 306; Hill on Trustees, 233.

[1] It would be impossible in a work like the present to notice these statutes in detail—they vary in different States. See Perry on Trusts, chap. xiii.

[2] See Bacon on Uses, 9; Servis *v.* Nelson, 1 McCart. 94; Perry on Trusts, § 21. See, however, Baker *v.* Williamson, 4 Barr, 456, and Tritt *v.* Crotzer, 1 Harris, 451.

[3] *Supra*, Introduction, chap. ii., p. 31.

[4] Egerton *v.* Brownlow, 4 H. L. Cas. 210; Sackville-West *v.* Holmesdale, L. R. 4 H. L. Cas. 565; Tillinghast *v.* Coggeshall, 7 R. Island, 383; Glenorchy *v.* Bosville, 1 Lead. Cas. Eq. 1, and notes.

of B., the interest which B. will take will be construed, under the rule in Shelly's case, to be a fee.[1] But if the instrument were designed to be merely a minute or draft of a scheme for settling an estate, the same provision would be construed as indicating an intention to give B. an estate for life only, and that his heirs should take by purchase. When, therefore, the formal instrument, by which the minute is to be carried out, comes to be drawn, a court of equity will see that a settlement is made which will in due form of legal conveyancing effectuate the intention of the creator of the trust—that is, the conveyance will be drawn in such a way that B. will take but a life estate, and the parties intended to be described by the word "heirs," will take as purchasers in remainder.[2]

The distinction between executed and executory trusts was once much shaken by the decision of Lord Hardwicke, in Bagshaw *v.* Spencer;[3] but that learned chancellor subsequently receded from his position,[4] and the difference between the two classes of trusts is now well settled, both in England and America.[5]

In ascertaining the *intention* in cases of executory trusts, it must be remembered that in marriage articles there is always supposed to be a design to benefit the issue of the proposed marriage; but no such intention is presumed to exist in regard to wills. A chancellor, therefore, in decreeing a settlement in conformity with marriage articles, will always take care that the issue are provided for; but no such care will be taken in

[1] See Wright *v.* Pearson, 1 Eden, 119; Austen *v.* Taylor, Id. 361; Jones *v.* Morgan, 1 Bro. C. C. 206; Jervoise *v.* Duke of Northumberland, 1 J. & W. 539; Price *v.* Sisson, 2 Beas. 168; Dennison *v.* Goehring, 7 Barr, 177.

[2] Sackville-West *v.* Holmesdale, L. R. 4 H. L. Cas. 565; Wood *v.* Burnham, 6 Paige, 513; Porter *v.* Doby, 2 Rich. Eq. 49; Saunders *v.* Edwards, 2 Jon. Eq. 134; Glenorchy *v.* Bosville, 1 Lead. Cas. Eq. 20, and notes: Perry on Trusts, § 359. See further upon the general subject, Yarnall's Appeal, 20 P. F. Sm. 340; Bacon's Appeal, 7 Id. 504; Neves *v.* Scott, 9 How. 211; 13 Id. 268; Jervoise *v.* Northumberland, 1 J. & W. 570.

[3] 2 Atk. 142; 1 Ves. 142, 152.

[4] Exel *v.* Wallace, 2 Ves. 323.

[5] Dennison *v.* Goehring, 7 Barr, 177; Wood *v.* Burnham, 6 Paige, 518; 26 Wend. 9; Horne *v.* Lyeth, 4 H. & J. 434; Garner *v.* Garner, 1 Dessaus. 444; Loving *v.* Hunter, 8 Yerger, 31; Edmondson *v.* Dyson, 2 Kelly, 307; Berry *v.* Williamson, 11 B. Mon. 245.

the case of wills, unless in obedience to some intention expressed in the will.[1] As to what will be sufficient evidence of intention, the authorities are not, perhaps, altogether uniform.[2]

Where, however, the intention of the testator to benefit the issue sufficiently appears, the settlement will be made in such a manner as to effectuate that intention.[3] There is, indeed, no difference between the rules applicable to marriage articles and those in regard to wills, further than this, viz., that in the former instruments *res ipsa loquitur*, the occasion itself testifies what the paramount object of the parties must have been.[4]

Where there are executory trusts of personalty, heirlooms, etc., as to which the ordinary limitations applicable to real estate would defeat, in many instances, the intention of the testator, because it would give a tenant in tail (for instance) absolute control, equity will see that the limitations are of such a nature as to prevent the intention from being defeated.[5]

58. A court of equity will entertain jurisdiction not only for the purpose of carrying out executory trusts, and seeing that the instrument which purports to fulfil the intention of the settlor really does so, but also for the purpose of reforming conveyances which have been improvidently drawn, and by which the objects sought to be reached by the executory minute or draft have not been attained. Where such an improvident instrument has been executed, equity will, as a general rule, reform it, and order it to be re-drawn in such a way as to effectuate the intention of the parties,[6] and the reformation may be decreed even after the death of the husband.[7] But where both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the

[1] Blackburn *v.* Stables, 2 Ves. & B. 369, Sweetapple *v.* Bindon, 2 Vern. 536; Perry on Trusts, §§ 360, 366.

[2] See American note to Glenorchy, *v.* Bosville, *ut sup.*

[3] Sackville-West *v.* Holmesdale, L. R. 4 H. L. Cas. 565.

[4] Id. This case contains a very full discussion of the law upon this point. Stanley *v.* Leigh, 2 P. Wms. 690; Scarsdale *v.* Curzon, 1 Johns. & H. 40; Shelley *v.* Shelley, L. R. 6 Eq. 546.

[6] Warrick *v.* Warrick, 3 Atk. 293. See also Neves *v.* Scott, 9 Howard, 197; Gause *v.* Hale, 2 Ired. Eq. 241; Smith *v.* Maxwell, 1 Hill Eq. 101; Green *v.* Rumph, 2 Id. 1.

[7] Viant's Settlement, L. R. 18 Eq. 436; Smith *v.* Iliffe, 20 Id. 666; Cogan *v.* Duffield, Id. 789.

articles will be taken as a new agreement between them, and will control the articles.[1]

If the intention expressed in the minute cannot be carried out without violating some statute or policy of the law, equity will carry it out as nearly as possible, so as to reconcile, as far as may be, the law and the intention of the settlor.[2]

59. In regard to the division of trusts into public and private trusts, it will be sufficient to remark that public trusts are such as are constituted for the benefit either of the public at large, or of some considerable portion of it answering to a particular description; and that private trusts are those wherein the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be, definitely ascertained, and to whom, therefore, collectively, unless under some legal disability, it is competent to control, modify, or determine the trust.[3] The principal difference in the nature of the two kinds of trusts is that those of a public character are not confined within the limits prescribed for settlements upon private trusts, but are of a more permanent and lasting character. This distinction will be more fully noticed when the subject of charittable trusts (which, indeed, have been said to be synonymous with public trusts)[4] is considered.[5]

In private trusts the devolution of the *cestui que trust's* estate, and the incidents of his ownership, are, as a general rule, the same as those of legal estates.

60. The rules for the descent of equitable estates are the same as those which regulate the devolution of legal titles; equitable interests are within the statute of distributions; and it is presumed, fall under the operation of the intestate acts throughout the United States.[6] Whatever would be the rule of law, if it was a legal estate is applied in equity to a trust estate.[7] A

[1] Legg *v.* Goldwire, Cas. t. Talbot, 20; 1 Lead. Cas. Eq. 17. Unless it is shown that the discrepancy arose from a clear mistake, in which case the settlement will be reformed. Bold *v.* Hutchinson, 5 D. M. & G. 558.

[2] Humbertson *v.* Humbertson, 1 P. Wms. 332; s. c., 2 Vern. 737; Prec. Ch. 455.

[3] Lewin, 23.

[4] Id.

[5] *Post*, chap. V.

[6] Lewin on Trusts, 680; Fairies' Appeal, 11 Harris, (Pa.) 29.

[7] Burgess *v.* Wheate, 1 Black. R. 155, 161; Croxall *v.* Shererd 5 Wallace, 281; Price *v.* Sissen, 2 Beas. 174; 1 Cruise on Real Prop. 387.

husband is entitled to an estate by the curtesy in his wife's equitable estates of inheritance, even though settled to her separate use;[1] and he will be entitled, at common law, to her equitable personalty except in so far as his rights are controlled by the doctrine of the wife's equity to a settlement.[2] By an anomalous decision, however, a wife in England is not dowable of a trust estate.[3] But the rule in most of the United States appears to be different, it having, in some States, been altered by statute;[4] and the point in England has ceased to be of practical importance.[5]

Before the statute of uses it had been decided that the estate of the *cestui que use* was not subject to forfeiture and escheat, but that the feoffee to uses became, thereupon, the absolute owner.[6] After the statute the same rule was applied to trusts.[7] By subsequent statute the estate of the *cestui que trust* was forfeited for treason;[8] but upon forfeiture for felony, or escheat, the trustee took the estate discharged of the trust.[9] But this rule does not apply to chattels nor to an equity of redemption.

In the United States, the opinion is that the State would take both real and personal property as *ultimus hæres*.[10] If the legal title to real estate cannot be taken by an alien, the beneficial ownership cannot be enjoyed by him.[11]

[1] Roberts *v.* Dixwell, 1 Atk. 607; Morgan *v.* Morgan, 5 Madd. 408; Follett *v.* Tyall, 14 Sim. 125; Appleton *v.* Rowley, L. R. 2 Eq. 139; Cooper *v.* MacDonald, L. R. 7 Ch. D. 288; Lewin on Trusts, 607; Ege *v.* Wedlar, 1 Norris, 86; Dubs *v.* Dubs, 7 Casey, 149. Unless there is a clear intention to exclude the husband's title; Cochran *v.* O'Hern, 4 W. & S. 99; Stokes *v.* McKibbin, 1 Harris, 268; Rigler *v.* Cloud, 2 Id. 363.

[2] Hill on Trustees, 405; 4 Kent's Com., 30; *post*, chap. IV.

[3] D'Arcy *v.* Blake, 2 Sch. & Lef. 387; Dixon *v.* Saville, 1 Bro. Ch. 326; Mayburry *v.* Brien, 15 Pet. 38.

[4] Williams on Real Prop. 214, note; Dubs *v.* Dubs, 7 Casey, 149.

[5] By the passage of the Dower Act, 3 and 4 Wil. IV., c. 105.

[6] See Burgess *v.* Wheate, 1 Eden, 199.

[7] Att. Gen. *v.* Sands, 1 Hale P. C. 249.

[8] 33 Hen. VIII., c. 20.

[9] Att. Gen. *v.* Sands; Burgess *v.* Wheate (*supra*). See also Onslow *v.* Wallis, 1 Mac. & G. 506; Sweeting *v.* Sweeting, 33 L. J. Ch. 211.

[10] See Matthews *v.* Ward, 10 Gill & J. 454.

[11] Du Hourmelin *v.* Sheldon, 1 Beav. 79; 4 M. & C. 525; Atkins *v.* Kron, 5 Ired. Eq. 207; Hubbard *v.* Goodwin, 3 Leigh, 492; Leggett *v.* Dubois, 5 Paige, 114; Taylor *v.* Benham, 5 Howard, 270. See also Sharp *v.* St. Sauveur, L. R., 7 Ch. 352; overruling Rittson *v.* Stordy, 3 Sm. & Gif. 230; and approving Barrow *v.* Wadkin, 24 Beav. 1.

61. The right of alienation, by deed and will, attaches to equitable estates, and any restrictions upon that right are invalid; and moreover the incident of involuntary alienation, or, in other words, the liability of the estate to be taken in execution for the debts of the beneficial owner, also applies to such estates. There may, indeed, be a limitation over upon the bankruptcy or insolvency of the *cestui que trust*, or upon the happening of any event whereby the property may belong to some other person; and such limitations are of frequent occurrence.[1] But the *cestui que trust* cannot hold the property for the purposes of enjoyment freed from the duty of applying it in discharge of his obligations.[2] It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts, and it cannot be so fenced about by inhibitions and restrictions, as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go.[3] This is the general rule throughout the United States and in England. In some of the States of the Union, however, a different doctrine has been held. Thus in Pennsylvania it is now firmly established by many authorities that when a gift in trust is made for life coupled with a proviso exempting the estate of the *cestui que trust* from liability for his debts, and where he is excluded from the control of the property,[4] such proviso will be

[1] See Williams on Real. Prop. 87, and notes.

[2] Dumpor's Case, 1 Sm. Lead. Cases, 119, Judge Hare's note. See, also, Horberry *v.* Harding, 10 Lea (Tenn.) 392.

[3] Nichols *v.* Levy, 5 Wallace, 441; Hallett *v.* Thompson, 5 Paige, 583; Dick *v.* Pitchford, 1 Dev. & Bat. (Eq.) 480; Blackstone Bank *v.* Davis, 21 Pick. 42; Easterly *v.* Keney, 36 Conn. 22; Taylor *v.* Haswell, 65 Alab. 1 (compare Jones *v.* Reese, Id. 134); Brandon *v.* Robinson, 18 Vesey, 429. See Hutchins *v.* Heywood, 50 N. Hamp. 491, where it was held that a resulting trust was executed by the statute of uses, and could be levied upon and sold under ordinary process.

[4] See Adams's Eq. 43.

good without any limitation over upon insolvency.[1] And this end may be accomplished not only by a proviso which expressly exempts the trust property from the debts of the beneficiary, but also by a direction that the income shall be disbursed for the benefit of the *cestui que trust* only to the extent which the trustee may in his discretion deem advisable; for to subject the income, so bequeathed, to execution at the suit of a creditor, would end the discretion of the trustee and defeat the intent of the testator.[2] And this rule seems also to exist in Connecticut, Massachusetts, Virginia, Kentucky, Missouri and Alabama.[3] But where there is a limitation over upon insolvency, the mere fact that the trustees have a discretion to apply the income to the benefit of the insolvent will not affect the validity of the limitation over or subject the funds which the trustees, in exercising their discretion, may see fit to give to the beneficiary to the payment of his debts. This proposition was laid down in the Supreme Court of the United States in the case of Nichols *v.* Eaton,[4] where the facts were as follows: A testatrix devised her estate, real and personal, to trustees, upon a trust to pay the income to her children equally during their lives, subject to the conditions—1st, that in case of the alienation of such income by either of her sons, or in case of the bankruptcy or insolvency of either of them, or if from any other cause the income could no longer be personally enjoyed by either of them, the trust as

[1] Fisher *v.* Taylor, 2 Rawle, 33; Ashhurst *v.* Given, 5 W. & S. 323; Vaux *v.* Parke, 7 Id. 19; Holdship *v.* Patterson, 7 Watts, 547; Norris *v.* Johnston, 5 Barr, 287; Eyrick *v.* Hetrick, 1 Harris, 488; Shryock *v.* Waggoner, 4 Casey, 430; Brown *v.* Williamson's Ex'rs, 12 Casey, 338; Reese *v.* Livingstone, 5 Wright, 113; Still *v.* Spear, 9 Id. 168; Rife *v.* Geyer, 9 P. F. Sm. 395; Shankland's Appeal, 11 Wright, 113; Girard Life Ins. Co. *v.* Chambers, 10 Wright, 485; Overman's Appeal, 7 Norris, 276. In Massachusetts, see Bradbury Nat. Bk. *v.* Adams, 133 Mass. 170. But a person *sui juris* cannot settle the entire estate on himself free from liability for debts. Mackason's App., 6 Wright, 330; Mead *v.* Penna. Co., 5 Leg. & Ins. R. 107. See, upon the general subject, Ashhurst's Appeal, 27 P. F. Sm. 464.

[2] Keyser *v.* Mitchell, 17 P. F. Sm. 473.

[3] Leavitt *v.* Beirne, 21 Conn. 8; Foster *v.* Foster, 133 Mass. 179; Markham *v.* Guerrant, 4 Leigh, 279; Johnston *v.* Zane's Trustees, 11 Grat. 570; Pope's Ex'rs *v.* Elliott, 8 B. Mon. 56; Hill *v.* McRae, 27 Ala. 175; McIlvaine *v.* Smith, 42 Mo. 45; Davidson *v.* Kemper, 79 Ky. 5; and see Genet *v.* Beekman, 45 Barb. 382; and Campbell *v.* Foster, 35 N. Y. 361.

[4] 1 Otto, 716.

to such son should instantly cease and determine, and the income to which he would be otherwise entitled should be paid to his wife and children, if any, and, if none, to go back to the corpus of his estate; 2d, that the trustees should have power in their discretion, but without its being in any way obligatory upon them, to transfer absolutely to either of said children one-half of the trust fund from whence his or her share of the income under the preceding trust should arise, the trusts as to such portion of the estate thereupon to cease and determine; 3d, that in case of the cessation of the income by any cause except death, as before provided (as by bankruptcy, insolvency, or other cause preventing either of them from personally enjoying his or her share of the income), the trustees might, in their discretion, pay to or apply for either of the sons, or for the use of either of the sons, or his wife and family, so much of the income as he would have been entitled to if the forfeiture had not happened. One of the sons who was unmarried and without children became a bankrupt, and on a bill filed by the assignee in bankruptcy to subject his portion of the income to the claims of his creditors, it was held that the devise was not void, as in fraud of creditors, and that the relief prayed for would not be granted—and this, although a large sum of money ($25,000) had been paid by the trustee to the bankrupt since the bankruptcy. In this case the English authorities were reviewed and the conclusion reached that there was nothing in them to forbid such a trust, and that there was nothing upon principle or in the general policy of the law to prevent it from being carried out.[1]

62. Certain exceptions to the rules above stated, in regard to the devolution of trust estates, and the powers of the *cestui que trust*, exist in the case of trusts for married women, and will be noticed when that particular class of trusts comes under consideration.

Another exception formerly existed in England in relation to attendant terms, trusts of which, though of chattel interests, followed the descent of the inheritance which they were designed to protect. But the doctrine of attendant terms is now obsolete

[1] See also Keyser *v.* Mitchell, 17 P. F. Sm. 473.

in England ;[1] and was never of any practical importance in this country.[2]

Trust estates also follow the law of legal estates as to the injuries which may affect them and the consequences of these injuries. Thus, although the terms seizin and disseizin are not strictly applicable to equitable estates, a court of equity regards the actual receipt of rents and profits under the equitable title as equivalent to seizin at law, and an adverse perception of the rents and profits as amounting to an ouster.[3] Moreover, if such adverse enjoyment of the equitable estate continues for twenty years, it would, by analogy to the statutes of limitations applicable to legal titles, bar any assertion by the *cestui que trust* of his right in equity.[4]

CHAPTER II.

EXPRESS TRUSTS; AND HEREIN OF VOLUNTARY DISPOSITIONS IN TRUST, OF PRECATORY TRUSTS, AND OF POWERS IN TRUST.

63. Trusts created by direct fiduciary expressions; trusts averable at Common Law.
64. Statute of Frauds.
65. Language by which a Trust may be created.
66. Voluntary dispositions in trust; *Milroy* v. *Lord ; Ex parte Pye.*
67. General result of the authorities; *Donaldson* v. *Donaldson; Kekewich* v. *Manning.*
68. Voluntary Assignments for the benefit of Creditors.
69. Meritorious Consideration; *Ellis* v. *Nimmo.*
70. *Donatio mortis causa.*
71. Trusts created by Precatory Words.
72. Doctrine on this subject in England; in the United States generally; in Pennsylvania and Connecticut.
73. What precatory words will create a trust.
74. Such words *prima facie* imperative.
75. Certainty of the object is an element for consideration.
76. Certainty of the Subject.
77. Powers in Trust; *Salusbury* v. *Denton.*

63. EXPRESS trusts, being those which are created by the language of the parties, may, it is obvious, arise either by direct

[1] Stat. 8 and 9 VIC., c. 112.

[2] See 4 Kent's Com. 87.

[3] Lewin on Trusts, 466 (4th Eng. ed.) Story's Eq. Jurisp., § 975.

[4] Merriam *v.* Hassam, 14 Allen 516; Watkins *v.* Specht, 7 Coldw. 585; Perry on Trusts, §§ 855, 860, 864; Story's Eq. Jurisp , § 975.

fiduciary expressions whereby the relationship of trustee and *cestui que trust* is distinctly established, or by expressions of a more uncertain and equivocal character which might not in the opinion of a layman be considered as indicating an intention to create a trust, but which have been construed by a series of judicial decisions to be effective in so doing.

Before, however, considering the question as to what language is necessary to create a trust, it will be proper to premise that at common law trusts, both of real and personal property, could be created by parol.[1] A trust of realty, like a use, was in technical language "averable;" that is, it could be created by word of mouth.[2] The better opinion is, however, that this is only true of those cases in which the legal estate could be created by feoffment, where (of course) no writing was necessary. But when a deed was requisite for the conveyance of the legal estate (as in a covenant to stand seised to uses), there uses and trusts were not averable, but could be treated only in the same manner as legal estates.[3] In Connecticut, it has been held that trusts were not averable at common law;[4] but the weight of American authority is decidedly the other way.[5]

64. The statute of frauds (29 Car. II., c. 3) changed the rule in regard to real estate, and enacted (in the 7th section) that "all declarations or creations of trusts, or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of none effect." An assignment of a trust of realty must also be in writing.[6]

This statute applies to chattels real as well as to freehold estates;[7] though not to mere personal rights concerning land,

[1] See Tritt *v.* Crotzer, 1 Harris, 451. The evidence of a parol trust should be clear, distinct and positive; Emerick *v.* Emerick, 3 Phila. 94.

[2] Lewin on Trusts, 56; Perry on Trusts, § 75; Fordyce *v.* Willis, 3 Bro. C. C. 587.

[3] Gilbert on Uses, 270.

[4] Dean *v.* Dean, 6 Conn. 285.

[5] Fleming *v.* Donahoe, 5 Ohio, 257; Miller *v.* Thatcher, 9 Texas, 485; Osterman *v.* Baldwin, 6 Wal. 116; Shelton *v.* Shelton, 6 Jones, (Eq.) 292; Murphy *v.* Hubert, 7 Barr, 420; Anding *v.* Davis, 38 Miss. 574.

[6] See 29 Car. II., §§ 7, 8, 9.

[7] Skett *v.* Whitmore, Freem. 280; Riddle *v.* Emerson, 1 Vern. 108; and see Hutchins *v.* Lee, 1 Atk. 447; Bellasis *v.* Compton, 2 Vern. 294.

such as mortgages and charges.[1] And where land has been conveyed on a parol trust, and is afterwards converted into money, a subsequent parol declaration of trust will be sufficient.[2]

It is to be observed that the statute does not require trusts of realty to be *created*, but only to be manifested and proved by writing.[3] The distinction is of practical importance, because a subsequent written acknowledgment of a trust will cause the interest to relate back to the date of its original creation, so as to bring it (for example) within the operation of a will of the *cestui que trust* executed *before* the written acknowledgment, but *after* the verbal creation.[4]

This statute has been re-enacted in most of the United States; in some of which, however, the language of the statute has been somewhat varied. Thus in Maine, trusts must be "created and declared in writing."[5] In Illinois, "declarations or creations of trusts must be manifested and proved" in writing.[6] The statutes of Vermont and Massachusetts are similar.

It is considered, however, by a learned writer, that this variation of language does not produce any substantial difference in the effect of the statutes, but that under all of them it will be sufficient if the trust is proved by some writing, although executed after its creation.[7]

Personal chattels are not within the statute of frauds; and trusts of them may be proved by parol.[8] Implied trusts are

[1] Benbow *v.* Townsend, 1 M. & K. 506; Bellasis *v.* Compton, 2 Vern. 294. See Perry on Trusts, § 86.

[2] Maffitt's Adm'r. *v.* Rynd, 19 P. F. Sm. 386.

[3] "There is a distinction between an agreement and a trust under the Statute of Frauds, and a trust need not, like an agreement, be constituted or created by writing." By Chancellor Kent in Movan *v.* Hays, 1 Johns. Ch. 342.

[4] Ambrose *v.* Ambrose, 1 P. Wms. 322. See also Foster *v.* Hale, 3 Ves. Jr. 996; 5 Id. 315; Barrell *v.* Joy, 16 Mass. 223; Safford *v.* Rantoul, 12 Pick. 233 (where a like interpretation was given to the Massachusetts statute conferring on the courts equity jurisdiction in cases of "trusts arising under deeds"); and Sime *v.* Howard, 4 Nevada, 483.

[5] Rev. Stats. (1857) ch. 73, § 11, p. 450. See Gerry *v.* Stimson, 60 Maine, 188.

[6] Rev. Stats. of 1877, § 9, p. 522.

[7] Perry on Trusts, § 81; and see Bragg *v.* Paulk, 42 Maine, 502; Sime *v.* Howard, 4 Nevada, 482; McClellan *v.* McClellan, 65 Me. 505; Kingsbury *v.* Burnside, 58 Ill. 310; Faxon *v.* Folvey, 110 Mass. 392.

[8] M'Fadden *v.* Jenkyns, 1 Hare, 451; 1 Ph. Ch. 157; Benbow *v.* Townsend, 1 M. & K. 506; Hawkens *v.* Gardiner, 2 Sm. & Giff. 451; Kimball *v.* Morton, 1 Halst. Ch. 31; Higgenbottom *v.* Pey-

expressly excepted from the operation of the statutes in most of the States.

It is not essential that the writing by which the trust is "manifested and proved" should be in any particular form. It may be couched in any language which is sufficiently expressive of an intention to create a trust. Thus, a *nota bene* at the foot of a deed,[1] or a mere letter or memorandum will be enough.[2] The writing, however, must declare with sufficient *certainty what the trust is.*[3]

An answer in chancery admitting the trust will be sufficient to take it out of the statute;[4] but the better opinion seems to be that this will not be the rule if the defendant chooses to insist upon the benefit of the statute.[5] If the answer denies the agreement upon which the trust is based, it need not expressly set up the statute, or (in other words) take the defence that the agreement was in parol.[6]

A trust may be created by will; but to be valid, the will must be duly executed. A writing which purports to be a testamentary paper, if not properly executed to take effect as a will, cannot be relied upon as a memorandum to satisfy the statute.[7]

And so, where the creator of a trust can only act under certain formalities, those formalities must be observed. Thus, the declarations of a trust respecting realty by a married woman,

ton, 3 Rich. Eq. 398; Kirkpatrick *v.* Davidson, 2 Kelly, 297; Day *v.* Rath, 18 N. Y. 447; Gilman *v.* McArdle, 99 Id. 451; Hooper *v.* Holmes, 3 Stock. (Ch.) 122; Maffitt *v.* Rynd, 19 P. F. S. 380; Barkley *v.* Lane, 6 Bush, (Ky.) 587. See Perry on Trusts, § 86.

[1] Ivory *v.* Burns, 6 P. F. Sm. 300.

[2] Dale *v.* Hamilton, 2 Phillips, 266; Foster *v.* Hale, 3 Ves. Jr. 696; 5 Ves. Jr. 308; Reybold *v.* Reybold, 8 Harris, (Pa.) 308; Roberts's Appeal, 92 Pa. St. 407; Maccubbin *v.* Cromwell, 7 Gill & J. 164; Barrell *v.* Joy, 16 Mass. 221; Packard *v.* Putnam, 57 New Hamp. 31; De Laurencel *v.* De Boom, 48 Cal. 581; Throop *v.* Hatch, 3 Abb. Pr. R. 29; Pratt *v.* Ayre, 3 Chand. 265; Starr *v.* Starr, 1 Ohio, 321. Though see Homer *v.* Homer, 107 Mass. 82. See, also, Reid *v.* Reid, 12 Rich. Eq. 213.

[3] Steere *v.* Steere, 5 Johns. Ch. 1; Smith *v.* Mathews, 3 D., F. & J. 139; Cook *v.* Barr, 44 N. Y. 161.

[4] Maccubbin *v.* Cromwell, 7 Gill & J. 164; Cozine *v.* Graham, 2 Paige, (Ch.) 177; Nab *v.* Nab, 10 Mod. 404, *per* Lord Chancellor Parker.

[5] Dean *v.* Dean, 1 Stock. (Ch.) 425; Whiting *v.* Gould, 2 Wis. 552; Perry on Trusts, § 85.

[6] Wolf *v.* Corby, 30 Maryland 36; Ontario Bank *v.* Root, 3 Paige, (Ch.) 478; Billingslea *v.* Ward, 33 Maryl. 51; Allen *v.* Chambers, 4 Ired. Eq. 125.

[7] Perry on Trusts, § 89 to § 94; Lewin on Trusts, 47, 66, (4 Eng. ed.).

must, when the statute requires that her conveyances shall be separately acknowledged, be made out in some other mode than by her admission or acknowledgment, orally or in writing. It must be accompanied with a certificate of separate examination and voluntary acknowledgment required by the statute in the case of her deed.[1]

65. Having premised thus much concerning the *instrument* which is needed for a valid trust, we must now consider what *language* should be used in order that a trust may be created.

"Three things," it has been said,[2] "must concur to raise a trust, sufficient words to create it, a definite subject, and a certain or ascertained object;" and to these requisites may be added another, viz., that the terms of the trust should be sufficiently declared.[3]

The precision with which it is necessary to define the subject-matter, and the object of the trust, will be noticed when we come to consider powers in trust, and that class of expressions which are known as precatory words. Putting these aside for the present, it may be said, that there must, in general, be sufficient words to create a trust; but that no particular form of expression is necessary. It will be enough if there be a complete intention, expressed with sufficient clearness.

The intention must be a complete one. Thus, where a party at the time he purchased a certain tract of land executed an instrument by which it was set forth that the purchase was "intended" for another, it was held that the mere fact that the purchaser "intended" to give the property to the alleged beneficiary, could not have the effect of raising a trust.[4] A mere inchoate and executory design is not enough,[5] and unless there is some distinct equity (as fraud, for example), it cannot be enforced.[6] The intention must be plainly manifested and not derived from loose and equivocal expressions of parties made at

[1] Graham *v.* Long, 15 P. F. Sm. 387, per Sharswood, J.

[2] By Sir Wm. Grant, in Cruwys *v.* Colman, 9 Ves. Jr. 323. See also Knight *v.* Boughton, 11 Cl. & Fin. 513; and Malim *v.* Keighley, 2 Ves. Jr. 335.

[3] Knight *v.* Boughton, 11 Clark & Fin. 513. See Campbell *v.* Brown, 129 Mass. 23, a case in which an attempt was made to set up a trust under circumstances which the court said created no trust "express, implied, resulting or constructive."

[4] Hays *v.* Quay, 18 P. F. Sm. 263.

[5] Bayley *v.* Boulcott, 4 Russ. 345; Harrison *v.* McMennomy, 2 Edw. Ch. 251. See also Gilpin *v.* Gilpin, 1 M. & K. 520; Willard *v.* Willard, 6 P. F. Sm. 119; Delinger's App., 21 Id. 425; Perry on Trusts, § 77.

[6] Donahoe *v.* Conrahy, 2 Jon. & Lat. 694.

different times and upon different occasions.[1] But any words which indicate with sufficient certainty, a purpose to create a trust, will be effective in so doing.[2]

It is not necessary that the terms "trust" and "trustee" should be used.[3] There is no magic in these words,[4] and any others which show that the donee was not intended to take beneficially, will affect his conscience with a trust.[5]

The declaration of trust may be contained in a different instrument from that by which the estate is vested in the trustee;[6] but the instruments must be contemporaneous, or, at all events, in contemplation at the same time; and if an absolute conveyance is made, no *subsequent* declaration can deprive the grantee of his beneficial interest.[7]

Slocom Marshall, 2 Wash. C. C. 398; Steere *v.* Steere, 5 Johns. C. R. 1; Mercer *v.* Stark, Sm. & Marsh. (Ch.) 479; Harris *v.* Barnett, 3 Grat. 339; Barkley *v.* Lane, 6 Bush (Ky.) 587.

[2] Fisher *v.* Fields, 10 John. 495; Carpenter *v.* Cushman, 105 Mass. 419; Norman *v.* Burnett, 25 Miss. 183; Porter *v.* The Bank of Rutland, 19 Verm. 410; Brown *v.* Combs, 5 Dutch. 36.

[3] Sharpless *v.* Welsh, 4 Dall. 261; Sheets's Estate, 2 P. F. Sm. 266; see Lewin, p. 108, note z. Though their absence is a circumstance to be attended to; King *v.* Denison, 1 V. & B. 273. See also Porter *v.* Bank of Rutland, 19 Verm. 410; Fisher *v.* Fields, 10 John. 495; Gordon *v.* Green, 10 Georgia, 534; Norman *v.* Burnett, 25 Miss. 183. On the other hand the words "trust" and "trustee" will not necessarily create a trust. Freedley's Appeal, 10 P. F. Sm. 344; Brown *v.* Combs, 2 Dutch. 36. See also Seldon's Appeal, 31 Conn. 548; Eldridge *v.* The See Yup. Co., 17 Cal. 44; Att. Gen. *v.* Merrimack Manufac. Co., 14 Gray, 612; Richardson *v.* Inglesby, 13 Rich. Eq. 59.

[4] Sheets's Estate, 2 P. F. Sm. 266.

[5] Crockett *v.* Crockett, 1 Hare, 451; Bibby *v.* Thompson, 23 Beav. 646; Jubber *v.* Jubber, 9 Sim. 503; Pierce *v.* McKeehan, 3 W. & S. 283; Raikes *v.* Ward, 1 Hare, 445; Inderwick *v.* Inderwick, 13 Sim. 652; Aynesworth *v.* Haldeman, 2 Duvall, 571; Day *v.* Roth, 18 N. Y. 453.

[6] Inchiquin *v.* French, 1 Cox, 1; Wood *v.* Cox, 2 M. & Cr. 684; Stubbs *v.* Sargon, 2 Keen, 255; Smith *v.* Attersoll, 1 Russ. 266; or in a *notâ bene* at the foot of a deed; Ivory *v.* Burns, 6 P. F. Sm. 300.

[7] Adlington *v.* Cann, 3 Atk. 145; Crabb *v.* Crabb, 1 M. & K. 511; Kilpin *v.* Kilpin, Id. 520, 532. See also Briggs *v.* Penny, 3 McN. & G. 546; Johnson *v.* Ball, 5 De G. & Sm. 85; Dawson *v.* Dawson, Cheves Eq. (S. C.) 148; Johnson *v.* Clarkson, 3 Rich. Eq. 305; Wallgrave *v.* Tebbs, 2 K. & J. 313; Tee *v.* Ferris, Id. 357; Russell *v.* Jackson, 10 Hare, 204; Lomax *v.* Ripley, 3 Sm. & Giff. 48; Brown *v.* Brown, 12 Maryl. 87; Tritt *v.* Crotzer, 1 Harris, 451; Ivory *v.* Burns, 6 P. F. Sm. 303; Bennett *v.* Fullmer, 13 Wright, 155; Chapman *v.* Wilbur, 3 Oregon, 326; Perry on Trusts, § 77.

As to the *quantity* of the estate which the *cestui que trust* is to take, it is only necessary that the intention upon the subject should be clearly expressed; and it is not necessary that the technical words required in the limitation of legal estates should be used. Thus an equitable fee may be created without the use of the word "heirs;" and a fee tail without the use of "heirs of the body,"[1] provided always that the intention to give a fee sufficiently appears. Where a trust is created by a *devise* by which the fee is given to the trustee, the *cestui que trust* will be entitled to the beneficial ownership in fee, without an express limitation to his heirs, because it is supposed that the testator intended that the beneficial interest should exhaust the entire legal estate.[2] But in a deed the rule is otherwise.[3]

Where technical words are used, however, they must be taken in their legal and technical sense;[4] except in certain cases of executory trusts, which have been already noticed.

66. It has been said that in order to create a valid trust there must not be merely an inchoate intention, but that the transactions must be complete. This rule, it must be remembered, applies more particularly to trusts which are created by voluntary dispositions, and which may be conveniently considered in this place.

For a trust may arise either out of a contract or out of a gift; and the distinction which it is desirable to remember is this, viz., that in trusts which grow out of contracts, and which are, therefore, based upon a consideration, it is not necessary that the intention should have proceeded to the same extent as is required in trusts which are purely voluntary.[5] And this is only an application of the rule which exists at common law in reference to the distinction between contracts and gifts, as the former rest *in fieri*, whereas a gift can only be effectual after the intention to

[1] Shep. Touch., by Preston, 106; Lewin on Trusts, 140; Fisher *v.* Fields, 10 Johnson, 505.

[2] Moore *v.* Cleghorn, 10 Beav. 423; on appeal, 12 Jurist, 591; Knight *v.* Selby, 3 Man. & Gran. 92; Doe *v.* Cafe, 7 Exch. 675; Watkins *v.* Weston, 32 Beav. 238; Perry on Trusts, § 337.

[3] Holliday *v.* Overton, 14 Beav. 467, 15 Beav. 480.

[4] Wright *v.* Pearson, 1 Eden 125; Glenorchy *v.* Bosville, Cas. t. Talb. 19.

[5] See Ownes *v.* Ownes, 8 C. E. Green, 62; Perry on Trusts, § 95.

make it has been followed by actual delivery of possession or some equivalent act. "A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately. * * * But if a gift does not take effect by delivery of immediate possession, it is not then properly a gift but a contract."[1] The common-law rule, therefore, in reference to the transfer of legal titles, has been followed in equity as to the creation of equitable estates; and trusts which are purely voluntary—that is, those which do not depend upon or grow out of a consideration—must, to be effectually created, be accompanied by the delivery of the subject of the trust, or by some act so strongly indicative of the donor's intention as to be tantamount to such delivery.[2] An imperfect conveyance, which is also merely voluntary, will not be aided or enforced in equity.[3] The settlor must do all in his power, that the nature of the property will admit of, to carry out his intention. Lord Justice Turner, in Milroy *v.* Lord,[4] said that a voluntary settlement could be made in one of three ways: first, by direct transfer or assignment to the donee; second, by assignment to a trustee accompanied by an actual transfer of the legal estate if that is in the settlor; and third, by a declaration that the settlor holds in trust for the donee.[5] Ex parte Pye[6] is an old and leading authority upon this branch of the law, and is an illustration of the last of the three classes of cases mentioned in Milroy *v.* Lord. In that case, M. wrote a letter in which he requested his attorney

[1] 2 Black. Com. 441. See 2 Kent's Com. 438. It will be remembered that even at law a voluntary instrument, although executory in its character, will be supported as a gift of the money *if it be under seal*, for the seal will import a consideration. Sherk *v.* Endress, 3 Watts & Serg. 256; Yard *v.* Patton, 1 Harris, 285; Mack's Appeal, 18 P. F. Sm. 233.

[2] See Cox *v.* Sprigg, 6 Maryl. 274; Taylor *v.* Staples, 8 R. Island, 170, 176; Otis *v.* Beckwith, 49 Illinois, 121, 128; Wadhams *v.* Gay, 73 Ill. 415; Trough's Estate, 25 P. F. Sm. 115; Zimmerman *v.* Streeper, Id. 147.

[3] Minturn *v.* Seymour, 4 Johns. Ch. 498; Acker *v.* Phoenix, 4 Paige, 305; Dawson *v.* Dawson, 1 Dev. Eq. 93, Caldwell *v.* Williams, 1 Bailey Eq. 175, Crompton *v.* Vesser, 19 Alab. 259; Hayes *v.* Kershow, 1 Sand. Ch. 258; Reed *v.* Vannorsdale, 2 Leigh, 569; Evans *v.* Battle, 19 Alab. 398; Pinckard *v.* Pinckard, 23 Id. 649; Holland *v.* Hensley, 4 Clark, 222; Pringle *v.* Pringle, 9 P. F. Sm. 281.

[4] 4 De G. F. & J. 263.

[5] See the opinion of Vice-Chancellor Wood in Donaldson *v.* Donaldson, Kay, 711.

[6] 18 Vesey, 140.

in France to purchase an annuity for the benefit of a certain lady. The purchase was made, but the annuity was taken in the name of the writer of the letter, who afterwards sent a letter of attorney to transfer the same to the name of the intended donee. The donor died before the transfer was made, but the news of his death did not reach the attorney until after the transfer. The transfer being good according to the law of France, the court held that there had been a complete declaration of trust.

So in Crawford's Appeal,[1] where a husband credited his wife with a sum of money on his books, it was held that this was an effective declaration of trust in the wife's favor. And a deposit of money in bank to the credit of another will have the same effect.[2]

Ellison *v.* Ellison[3] may, also, be referred to as a leading authority upon this subject. "I take the distinction to be," said Lord Eldon in that case, "that if you want the assistance of the court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust;* as upon a covenant to transfer stock, etc., if it rests in covenant, and is purely voluntary, this court will not execute the voluntary covenant; but if the party has completely transferred stock, etc., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court."[4] The doctrine is the same as that which had been laid down by Lord Thurlow in Colman *v.* Sarrel,[5] where it was held that when a party comes into equity to *raise* an interest by way of trust, there must be a valuable, or, at least, a meritorious consideration; and that a mere voluntary covenant to convey would not be enforced.

[1] 11 P. F. Sm. 52.

[2] Blanchard *v.* Sheldon, 43 Vt. 512. Garish *v.* New Bedford Inst. for Saving, 128 Mass. 159; Taft *v.* Bowker, 132 Id. 277. See article in 18 Am. Law Rev. 392, where the authorities on this particular point are collected.

[3] 6 Vesey, 656.

[4] 6 Vesey, 662. See also, Stone *v.* Hackett, 12 Gray, 227; Wright *v.* Miller, 4 Seld. 9; Andrews *v.* Hobson, 23 Ala. 219; Greenfield's Estate, 2 Harris (Pa.) 489; Reese *v.* Ruth, 13 S. & R. 434; Delamater's Estate, 1 Whart. 362; Souverbye *v.* Arden, 1 Johns. Ch. 240; Bunn *v.* Winthrop, Id. 337; Clarke *v.* Lott, 11 Ill. 105; Crompton *v.* Vassar, 19 Ala. 266; Vreeland *v.* Van Horn, 2 C. E. Green, 139; Stone *v.* King, 7 R. I. 358; Ray *v.* Simmons, 11 Id. 268; Dollinger's Appeal, 21 P. F. Sm. 425; Adams *v.* Adams, 21 Wal. 185; Ritter's Appeal, 9 P. F. Sm. 9; Pringle *v.* Pringle, Id. 286; Carhart's Appeal, 28 Id. 119; Paul *v.* Paul, 20 Ch. D. 742.

[5] 1 Ves. Jr. 50. See, also, Trough's Estate, 25 P. F. Sm. 115; and Appeal of Waynesburg College, 111 Pa. St. 130.

Where, however, a consideration exists, the case is different.[1] A contract then arises which will be enforced by the courts, and equitable interests flowing therefrom will, as between the immediate parties, be as much protected as legal rights. Where the legal or equitable rights of third parties intervene, the rule may be varied.[2]

67. The cases upon the subject of voluntary declarations of trusts have been quite numerous, and it is impossible, in a treatise like the present, to do more than indicate their general results, without discussing the distinctions established by particular authorities.

When a settlor is possessed of the legal title to the subject-matter of the settlement, he may create a valid trust thereof, either by a declaration that he holds the property in trust, or by a transfer of the legal title to the property to a third party upon certain trusts. In other words, he may constitute either himself or another person the trustee. If he makes himself the trustee, no transfer of the subject-matter is necessary. If he makes a third party trustee, he must transfer to him the subject of the trust in such a mode as will be effectual to pass the legal title.[3] But if there is a mere *intention* to convey the property upon trusts, this will not be sufficient if the proper steps are not taken for the purpose of making a valid transfer of the legal title to the intended trustee.[4] Such was the case of Milroy *v.* Lord,[5] where a deed of assignment of stock, unaccompanied, however, by a *transfer of the stock*, was held ineffectual to create a trust. The case of Donaldson *v.* Donaldson,[6] may be referred to as an

[1] See Lightner's Appeal, 1 Norris, 301. See, also, the language of C. J. Gibson in Kisler *v.* Kisler, 2 Watts, 325, as to the distinction between a parol *declaration of trust*, and a parol declaration which is not a trust but a contract.

[2] See *post*, Part II., chap. on Notice.

[3] Dickerson's Appeal, 19 W. N. C. 121, citing the text.

[4] Lloyd *v.* Brooks, 34 Md. 33; Swan *v.* Frick, Id. 143.

[5] 4 DeG., F. & J. 264. See also Jones *v.* Lock, 35 L. J. Ch. 117; 11 Jur. N. S. 913; L. R., 1 Ch. 28; Forrest *v.* Forrest, 34 L. J. Ch. 428; Scales *v.* Maude, 6 D., M. & G. 43; Henderson *v.* Henderson, 21 Missouri, 379; Gilchrist *v.* Stevenson, 9 Barb. 9; and Cressman's Appeal, 6 Wright, (Pa.), 147. See, however, Huntly *v.* Huntly, 8 Ired. Eq. 250.

[6] Kay, 711. See also Vandenberg *v.* Palmer, 4 K. & J. 204; Lane *v.* Ewing, 31 Missouri, 75. A voluntary settlement may be good, although the grantor retain the instrument. The rule is, that where such a settlement is fairly made, the mere fact that the

authority upon the creation of voluntary trusts by a declaration that the settlor thereby constitutes himself the trustee, in which case no assignment of the legal title is required.[1]

It may be observed that according to some English authorities, an assignment which is ineffectual to pass the legal title may yet take effect as a declaration of trust; so that the result of the abortive attempt of the assignor to convey the legal title would be, under those authorities, to constitute him a trustee of that title for the party designed to be benefited.[2] But these decisions have

grantor retains possession of the deed, unaccompanied by other circumstances will not affect the validity of the settlement. Souverbye *v.* Arden, 1 Johns. Ch. 256; Clavering *v.* Clavering, 2 Vern. 473; 7 Bro. P. C. 400; Boughton *v.* Boughton, 1 Atk. 625; Johnson *v.* Smith, 1 Ves. 314; Bunn *v.* Winthrop, 1 Johns. Ch. 329; Adams *v.* Adams, 21 Wal. 185.

[1] If a settlor designs to effect a valid settlement in a certain mode, but the settlement fails to take effect by reason of an incomplete disposition, it cannot take effect in another mode, not intended by the settlor. Mllroy *v.* Lord, 8 Jur. N. S. 806.

[2] Richardson *v.* Richardson, L. R. 3 Eq. 692; Morgan *v.* Malleson, 10 Id. 475. See also Huntly *v.* Huntly, 8 Ired. Eq. 250; and Bond *v.* Bunting, 28 P. F. Sm. 210. In this last case the general subject was examined by Judge Hare (whose opinion was adopted by the Supreme Court), and the following language used: "It was established, at an early period, that the transfer of the legal title, in trust, for a third person, would vest the beneficial interest in the latter. Such was the origin of uses, and, subsequently, of trusts. A declaration of trust, under these circumstances, substantiates the existence of a duty, which would be obligatory, independently of the declaration. But it does not follow that an admission can give rise to a fiduciary obligation where none exists. 'The ordinary power of a chancellor,' said Gibson, C. J., in Read *v.* Robinson, 6 W. & S. 329, 'extends no further than the execution of a trust sufficiently framed to put the title out of the grantor, or to the execution of an agreement for a trust founded on a valuable consideration;' and the language of the same judge, in Morrison *v.* Beirer, 2 W. & S. 86, shows that he regarded a declaration of trust as inoperative where it does not rest on an antecedent obligation.

"In this uncertainty we may revert to principles. A declaration of trust by the owner of property in favor of a volunteer has no peculiar efficacy. It is simply a gift, which derives its force from the will of the donor. As applied to land, it is, consequently, invalid, if not under seal; and perhaps even then, unless the estate lies in grant. Where the law prescribes the mode of conveyance, it must be followed. When, however, there are no legal means of transfer, any words expressing an intention to confer a present interest may be effectual in equity. There can be no clearer manifestation of a design to part with the right of property in favor of another than an absolute assignment to him or for his use. The notion that a gift, which would be valid if made through a declaration of trust, will fail if put in the form of an assignment, was accordingly

not been approved in later cases;[1] and the true doctrine would seem to be laid down in Milroy *v.* Lord, as stated above.

repudiated in Richardson *v.* Richardson, Law Rep., 3 Eq. 686.

"The question was, whether the beneficial interest in certain promissory notes passed by a voluntary assignment of all the donor's personal estate. She did not indorse the notes, and the legal title consequently remained in her. The chancellor said that it was impossible to contend, after the decision in Kekewich *v.* Manning, 1 De G., M. & G. 176, that the beneficial interest did not pass by the assignment, because 'the decision in that case was not merely that a person who, being entitled to a reversionary interest or to stock standing in another's name, assigns it by a voluntary deed, thereby passes it, notwithstanding that he does not, in formal terms, declare himself to be a trustee of the property; but it amounts to this, that an instrument executed as a present and complete assignment is equivalent to a declaration of trust.'

"Here, as in Kekewich *v.* Manning, the instrument was under seal, but the *ratio decidendi* was broad enough to include an assignment by parol. Accordingly, where the donor signed and delivered the following memorandum to his physician: 'I hereby give and make over to Dr. Morris an India bond, number D. 506, value 1000*l.*, as some token for his kind attention to me during illness'—Lord Romilly said 'the writing is equivalent to a declaration of trust. If the donor had said: "I undertake to hold the bond for you," that would have been a declaration of trust, though there had been no delivery. This amounts to the same thing, and Dr. Morris is entitled to the bond.' Morgan *v.* Malleson, Law Rep., 10 Eq. 475.

"The decisions have advanced step by step to this conclusion, which is now established in England. The case of Kennedy *v.* Ware may be thought to indicate that it does not prevail in Pennsylvania. I have endeavored to show that the English authorities, on which Chief Justice Gibson relied, have been overruled. If this were a court of error, our course would be clear. As a tribunal of the first instance, we ought to adhere implicitly to the rulings of the court above. If the case of Kennedy *v.* Ware were identical with this, it would control our judgment. The assignment there was by parol. Here it is under seal. The difference seems to be immaterial, according to the authorities, but it affords room for a doubt. There is another consideration. The fund is given in trust for Jane and James S. Bond. They are described in the instrument as the children of John R. Bond. If they are also Mrs. Bond's, there is a meritorious consideration arising from a tie of blood. It seems that equity will give effect to a provision for a wife or child, though not for a collateral relation. See Hayes *v.* Kershow, 1 Sandford Ch. 258; Buford *v.* McKee, 1 Dana, 107; Dennison *v.* Goering, 7 Barr, 175; Kennedy *v.* Ware, 1 Id. 447. It was alleged during the argument that these were Bond's children by a former wife, but this does not appear of record. On the whole, we deem ourselves entitled to uphold the assignment."

[1] Warriner *v.* Richards, L. R., 16 Eq. 330; Richards *v.* Delbridge, 18 Id. 11; Moore *v.* Moore, Id. 474; Heartley *v.* Nicholson, 19 Id. 233; Breton *v.* Woollven, 17 Ch. D. 420; Pollock on Contracts, 185 (4th ed.); Ellison *v.* Ellison, 1 Lead. Cas. Eq. 262 (4th Eng. ed.). If the settle

Where a settlor is not possessed of the legal present title, but has only an equitable or reversionary interest in the subject, a trust may be created either by a declaration that the settlor holds in trust, or by an assignment upon trusts.[1] The first of these methods stands upon the same ground as declarations of trust of property of which the legal title is in the settlor. An assignment, however, of an equitable interest upon a voluntary trust differs from a like assignment of a purely legal interest, in that no further formalities are necessary in order to complete the transaction, as, the legal title not being in the assignor, he can, of course, take no steps to complete its transfer. A valid voluntary trust of an equitable or reversionary interest may, therefore, be created by a simple assignment.[2]

It was at one time supposed that, in the assignment of equitable interests, notice to the trustees was necessary.[3] But this does not now seem to be requisite.[4]

It sometimes happens that the voluntary settlor himself seeks the aid of a court of equity to have the settlement revoked; and the question has then arisen whether in such settlements powers of revocation ought not to be inserted, and how far a voluntary, irrevocable settlement, in the absence of any motive for an irrevocable gift, can be sustained. There has been some fluctuation of authority upon this point; but the true rule seems to be that the absence of a power of revocation is nothing more than a circumstance to be taken into account, and is of more or less weight according to the other circumstances of the case. Where the

ment is made in such a form as to be substantially a testamentary disposition, it will not be treated as an absolute conveyance in trust, but will be revocable during the lifetime of the settlor. Turner *v.* Scott, 1 P. F. Sm. 126; Frederick's Appeal, 2 Id. 338; Rick's App., 9 Out. 528. But an absolute deed is not rendered revocable by the mere fact that possession and control are reserved to the grantor during his life, or because it incorporates a will. See Dawson *v.* Dawson, Rice's Eq. 260; Robey *v.* Hannon, 6 Gill 464; Mayor of Baltimore *v.* Williams, 6 Md. 235; Craven *v.* Winter, 38 Iowa, 479.

[1] Collinson *v.* Pattrick, 2 Keen, 123; Tierney *v.* Wood, 19 Beav. 330.

[2] See Kekewich *v.* Manning, 1 De G., M. & G. 176, where the conflict of authority between Sloan *v.* Cadogan, Sug. V. & P. App. 26, and Fortescue *v.* Barnett, 3 My. & K. 36 on the one hand, and Edwards *v.* Jones, 1 My. & Cr. 226, and Meek *v.* Kettlewell, 1 Hare, 464, on the other, was settled in favor of the former class of cases. See also Otis *v.* Beckwith, 49 Illinois, 121.

[3] Meek *v.* Kettlewell, *ut sup.*

[4] Way's Trusts, 2 De G., J. & Sm. 365.

intent to make an irrevocable gift is perfectly apparent, or where, even in the absence of such a clear intent, a sufficient *motive* (such as protection against the grantor's own extravagance, or the like) for making such a gift exists, the settlement cannot be disturbed. But where the deliberate *intent* does not appear, and no *motive* exists, the absence of a power of revocation is *primâ facie* evidence of mistake.[1]

68. Voluntary assignments to trustees for the benefit of creditors have been held to constitute an exception to the general rules by which the creation of voluntary trusts is governed; inasmuch as, after such an assignment, but before it is communicated to the creditors, it is considered revocable at the option of the grantor.[2] It was, indeed, said by Sir L. Shadwell, V. C., in Garrard *v.* Lord Lauderdale,[3] that such a trust was revocable by the assignor even after it had been communicated to the creditors; but this doctrine has not met the approval of subsequent decisions, and cannot be considered sound.[4] The doctrine in Walwyn *v.* Coutts, when properly considered, appears to be based upon the ground that in such cases the assignee for the benefit of creditors is not strictly a trustee, but a mere agent of the debtor; and that if the true relation of the parties is that of principal and agent, the ordinary rule in such cases, viz., that the authority of the agent is revocable until acted upon, must apply.[5] In America, the rule in Walwyn *v.* Coutts, and particularly the dictum in Garrard *v.* Lord Lauderdale, have not been approved. The assent of the creditor is presumed to be given to a trust created for his benefit, and after such assent the trust is irrevocable by the grantor.[6]

[1] See Hall *v.* Hall, L. R., 8 Ch. 430; Garnsey *v.* Mundy, 24 N. J. Eq. 243; Russell's Appeal, 25 P. F. Sm. 269; Miskey's Appeal, 107 Pa. St. 628; Toker *v.* Toker, 3 D. J. & S. 487. See also Villers *v.* Beaumont, 1 Vern. 100; Naldred *v.* Gilham, 1 P. Williams, 577; Huguenin *v.* Baseley, 14 Ves. 300; Petre *v.* Espinasse, 2 M. & K. 496; Bill *v.* Cureton, Id. 503; Hastings *v.* Orde, 11 Sim. 205; Phillips *v.* Mullings L. R., 7 Ch. 244; Cooke *v.* Lamotte, 15 Beav. 234; Wollaston *v.* Tribe, L. R., 9 Eq. 44.

[2] Walwyn *v.* Coutts, 3 Mer. 707; 3 Sim. 14.

[3] 3 Sim. 1.

[4] Acton *v.* Woodgate, 2 M. & K. 495; Harland *v.* Binks, 15 Q. B. 713. See Johns *v.* James, 8 Ch. D. 744.

[5] See Bill *v.* Cureton, 2 M. & K. 511; and Lord Cranworth in Synnott *v.* Simpson, 5 H. L. Cas. 133, 134.

[6] Tennant *v.* Stoney, 1 Rich. Eq 223; England *v.* Reynolds, 38 Ala. 370; Moses *v.* Murgatroyd, 1 Johns.

Even in England, if a creditor is created a trustee, and the fact of the execution of the deed is communicated to him, the trust will thenceforward be irrevocable.[1]

If the trust for payment of debts is to take effect after the death of the assignor, an element of bounty is introduced which will take the case out of the ruling in Walwyn *v.* Coutts.[2]

69. Before leaving the subject of the creation of trusts by a voluntary disposition, it will be desirable to say a few words upon the question as to whether the meritorious consideration of blood is to be placed upon the same footing as one which is purely voluntary, so far as regards the disposition of courts of equity to enforce any right or supposed right founded thereon.

It was decided by Sugden, when Lord Chancellor of Ireland, that the meritorious consideration of blood was sufficient to set the court in motion for the purpose of enforcing an executory trust.[3] But this decision was not followed in England; and the doctrine must be considered as settled the other way, so far as that country is concerned.[4]

In the United States the authorities are not altogether harmonious. The English rule has been followed in Pennsylvania,[5] and in New York there is a dictum that a meritorious consideration would be sufficient;[6] while in South Carolina, it is said

Ch. R. 119; Shepherd *v.* McEvers, 4 Id. 136; Nicoll *v.* Mumford, Id. 523; Ward *v.* Lewis, 4 Pick. 518; New England Bank *v.* Lewis, 8 Id. 113; Pingree *v.* Comstock, 18 Id. 46; Ingram *v.* Kirkpatrick, 6 Ired. Eq. 463; Weir *v.* Tannehill, 2 Yerg. 57; McKinney *v.* Rhoads, 5 Watts, 343; Read *v.* Robinson, 6 W. & S. 329; 1 Lead. Cas. Eq. 327; Perry on Trusts, § 593. But the presumption of the creditor's assent may be rebutted by conduct. Gibson *v.* Rees, 50 Ill. 383.

[1] Siggers *v.* Evans, 32 Eng. L. & Eq. 139.

[2] Synnot *v.* Simpson, 5 H. L. Cas. 141; though see the remarks of Lord St. Leonards in his dissenting opinion, p. 152.

[3] Ellis *v.* Nimmo, Ll. & Goold, 333.

[4] See Holloway *v.* Headington, 8 Sim. 324; Jeffrys *v.* Jeffries, 1 Cr. & Ph. 138; Dillon *v.* Coppin, 4 My. & Cr. 647. In Moore *v.* Crofton, 3 Jones & Lat. 442, Sir E. Sugden was compelled to abandon the position he had taken in Ellis *v.* Nimmo.

[5] Kennedy *v.* Ware, 1 Barr, 445; Campbell's Estate, 7 Barr, 100; though see Dennison *v.* Goehring, 7 Barr, 175, and Bond *v.* Bunting, 28 P F. Sm. 210.

[6] Hayes *v.* Kershow, 1 Sand. Ch. 261. But the consideration of collateral consanguinity will not be enough. Id. See, also, Buford *v.* McKee, 1 Dana, 107.

that a voluntary declaration will be sufficient if under seal.[1] But the general tendency of the American authorities is the other way.[2]

70. In connection with the subject of voluntary declarations of trust, it might seem proper to notice *donationes mortis causa*, which are introduced, as a distinct head, in many treatises on equity jurisprudence. But a *donatio mortis causa* depends not upon an equitable, but a legal title; and the claim of the donee is not an essentially equitable right.[3] For the purpose of enforcing a *donatio mortis causa* it is sometimes necessary to resort to the equitable remedy for the administration and settlement of estates at the suits of legatees and others, which will be found noticed in its appropriate place.[4]

71. It has been seen, already, that no particular form of language is necessary to create a trust. Certain words, it is true, are considered apt words for that purpose, and are generally used in all carefully prepared instruments by which a disposition of property, either *inter vivos* or after death, is effected; but, nevertheless, if the expressions used sufficiently indicate an intention to create a trust, they will be construed to have that effect, although the technical words, most proper to accomplish the object in view, have not been employed.

This is especially so in the case of wills. The intention of the testator has always been regarded as the pole star by which any construction of the testamentary instrument is to be guided. To ascertain that intention is the aim of all well-directed attempts at interpretation. Whenever, therefore, it appears from the language of the will that it was the intention of the testator to create a trust, the courts will give effect to that intention, in whatever words it may be expressed.

[1] Caldwell *v.* Williams, 1 Bailey's Eq. 175.

[2] McIntire *v.* Hughes, 4 Bibb 186; Mahan *v.* Mahan, 7 B. Mon. 579; Bright *v.* Bright, 8 Id. 197. Perry on Trusts, § 109.

[3] "Courts of equity maintain a concurrent jurisdiction in all cases of such donations, where the remedy at law is not adequate or complete. But in such cases the jurisdiction stands on general grounds, and not upon any notion that a *donatio mortis causa* is, from its own nature, properly cognisable therein." Story's Equity Jurisp., § 666. See upon the general subject of these donations, Ward *v.* Turner, 1 Lead. Cas. Eq. 905 (1205, 4th Am. ed.) and notes.

[4] *Post*, Part III., chap. on Creditors' Bills and Administration Suits.

The expressions used by testators for the purpose of creating a trust are, of course, almost infinite in variety, but many of them have been grouped into a certain class, characterized by judges and authors under one general denomination—that, namely, of "Precatory Words." This term (precatory words) includes words of expectation, request, desire and recommendation; and the rule on this subject may be stated in general language to be, that wherever property is given by will to one person coupled with expressions of expectation, request, desire or recommendation that he will use or dispose of the same for the benefit of another, the donee will be considered a trustee of the property for the purposes indicated by the testator, unless it appears from other expressions in the will that the application or non-application of the subject to the designated object was intended to be left to the option of the donee. Thus, to take the simplest case: "If a testator gives 1000*l.* to A. B., desiring, wishing, recommending or hoping that A. B. will, at his death, give the same sum or any certain part of it to C. D., it is considered that C. D. is an object of the testator's bounty, and that A. B. is a trustee for him."[1] So, in an early case the words of the will were: "I give to my brother, Robert Mason, 2000*l.*, which I *desire* him at his death to give to his son and his children, and to the children of his late daughter, as he should think fit." Robert Mason died in the lifetime of the testator, after whose death the children of Robert and his daughter were held entitled to the 2000*l.* in equal shares.[2]

And so, in a modern case, where a woman left her husband the use and income of an estate for his life, "in the full confidence that he will, as he has heretofore done, continue to give and afford my children such protection, comfort and support as they or either of them may stand in need of," it was held that a trust was created for the benefit of her children which was capable of being ascertained and enforced.[3] The same general rule on this subject exists in most, if not all, of the United States.

[1] Per Lord Langdale, M. R., in Knight *v.* Knight, 3 Beav. 173. See Knight *v.* Boughton, 11 Cl. & F. 513.

[2] Mason *v.* Limbury, cited in Vernon *v.* Vernon, Ambler, 4.

[3] Warner *v.* Bates, 98 Mass. 274.

72. The doctrine of the creation of trusts by precatory words has not been invariably regarded with favor in England,[1] and in many cases a disposition has been evinced to qualify it or apply it very guardedly.[2] But it must, nevertheless, be considered the well-settled doctrine of the courts of chancery that a testamentary gift, accompanied by words of entreaty or recommendation, or expressing a wish or confidence, will be construed as creating an absolute trust, which the first taker of the gift will not be permitted to defeat.[3]

This doctrine has been followed in many of the United States, and its wisdom and soundness have been very ably vindicated.[4]

In Connecticut and Pennsylvania, however, the rule under consideration seems to have been regarded with some disfavor. In the former State the earlier decision of Bull *v.* Bull was disapproved in the more recent case of Gilbert *v.* Chapin ;[5] while in the latter, in Pennock's Estate,[6] the conclusions reached by the court were, that "words in a will, expressive of desire, recommendation and confidence, are not words of technical, but

[1] See Sale *v.* Moore, 1 Sim. 540.

[2] Briggs *v.* Penny, 3 MacN. & G. 546 ; Johnston *v.* Rowlands, 2 De G. & Sm. 356 ; Webb *v.* Wools, 2 Sim. N. R. 267 ; Reeves *v.* Baker, 18 Beav. 372 ; Hood *v.* Oglander, 34 L. J. Ch. 528 ; and McCormick *v.* Grogan, L. R., 4 H. L. Cas. 82.

[3] Eaton *v.* Watts, L. R., 4 Eq. 155 ; Bernard *v.* Minshull, Johnson, 276 ; Shovelton *v.* Shovelton, 32 Beav. 143 ; Gully *v.* Cregoe, 24 Id. 185 ; Ward *v.* Gray, 26 Id. 485 ; Proby *v.* Landor, 28 Id. 504 ; Brook's Will, 34 L. J. Ch. 616 ; Constable *v.* Bull, 3 De G. & Sm. 411 ; Irvine *v.* Sullivan, L. R., 8 Eq. 673 ; Le Marchant *v.* Le Marchant, 18 Id. 414. See Parnall *v.* Parnall, 9 Ch. D. 96. See particularly the remarks of Jessel, M. R., in Stead *v.* Mellor, 5 Ch. D. 227, approving the general doctrine, but criticizing the decision in Briggs *v.* Penny (*supra*).

[4] Warner *v.* Bates, 98 Mass. 274 ; Harrison *v.* Harrison, 2 Grattan, 1 ; Reid's Admr. *v.* Blackstone, 14 Grattan, 363 (though see Crump *v.* Redd's Admr., 6 Id. 372) ; Bull *v.* Bull,, 8 Conn. 47 ; Dresser *v.* Dresser, 46 Maine, 58 ; Erickson *v.* Willard, 1 N. Hamp. 217 ; Lucas *v.* Lockhart, 10 Sm. & Marsh. 466 ; Ward *v.* Peloubet, 2 Stock. Ch. 305 , Cole *v.* Littlefield, 35 Maine, 439 ; Carson *v.* Carson, 1 Ired. Eq. 329 ; Chase *v.* Chase, 2 Allen, 101 ; Loring *v.* Loring, 100 Mass. 340 ; Collins *v.* Carlisle, 7 B. Mon. 14 ; McRee's Admr. *v.* Means, 34 Alab. 349 ; though see Ellis *v.* Ellis, 15 Alab. 296. See also Lines *v.* Darden, 5 Florida, 51, where the general doctrine was recognised, although the circumstances of the case under consideration forbade its application.

[5] 19 Conn. 351.

[6] 8 Harris, (Pa.) 268–280. See also Paisley's Appeal, 20 P. F. Sm. 153 ; and The Second Ref. Pres. Church *v.* Disbrow, 2 P. F. Sm. 219. See Rhett *v.* Mason, 18 Grattan, 541.

of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust; and the old Roman and English rule on this subject is not part of the common law of Pennsylvania;" and that "such words may amount to a declaration of trust, when it appears, from other parts of the will, that the testator intended not to commit the estate to the devisee, or legatee, or the ultimate disposal of it to his kindness, justice, or discretion." Later cases have followed this rule.[1]

In New Jersey and South Carolina also the disposition appears to be to construe the rule with strictness;[2] and likewise in New York, where the English case of In re Hutchinson and Tenant[3] was followed, and the gift held to be absolute.[4]

73. It is, of course, almost impossible to state, with certainty, what particular precatory words will or will not, in any case, create a trust; for they are, in most instances, so interwoven with other expressions, that the effect to be given to them must depend very much upon the language of the particular instrument under consideration. The following expressions, however, have been held effective in fastening the character of a trust upon what would otherwise have been an absolute gift: "desire,"[5] "recommend,"[6] "not doubting,"[7] "in the fullest confidence,"[8] "wish and will,"[9] "allow,"[10] "hope,"[11] "entreat,"[12] and, in general, any words which indicate a desire that the donee should not take beneficially, but should be merely an instrument to distribute the testator's bounty to others.[13]

[1] Bowlby *v.* Thunder, 105 Pa. St. 173; Hopkins *v.* Glunt, 111 Id. 287. See Burt *v.* Herron, 86 Id. 400.

[2] Van Duyne *v.* Van Duyne, 1 McCart. 397; Lesesne *v.* Witte, 5 S. C. 450. See, in Massachusetts, Spooner *v.* Lovejoy, 108 Mass. 533.

[3] 8 Ch. Div. 540.

[4] Foose *v.* Whitmore, 82 N. Y. 405. See, Willets *v.* Willets, 35 Hun 401.

[5] Cruwys *v.* Colman, 9 Vesey, 319; Mason *v.* Limbury (*supra*); Erickson *v.* Willard, 1 N. Hamp. 217.

[6] Malim *v.* Keighley, 2 Vesey, Jr., 333, 529; Pierson *v.* Garnet, 2 Bro. C. C. 38, overruling Cunliffe *v.* Cunliffe, Amb. 686; Tibbits *v.* Tibbits, 19 Vesey, 664; Horwood *v.* West, 1 Sim. & Stu. 387; Ford *v.* Fowler, 3 Beav. 146.

[7] Massey *v.* Sherman, Ambler, 520; Parsons *v.* Baker, 18 Vesey, 476.

[8] Wright *v.* Atkyns, 17 Vesey, 255; 19 Id. 299; T. & R. 146; and see Warner *v.* Bates, 98 Mass. 274; Harrison *v.* Harrison's Admr., 5 Grattan, 1; Bull *v.* Bull, 8 Connecticut, 47; Dresser *v.* Dresser, 46 Maine, 48; Shovelton *v.* Shovelton, 32 Beav. 143.

[9] McRee's Admr. *v.* Means, 34 Alab. 349.

[10] Hunter *v.* Stembridge, 12 Geo. 192.

[11] Harland *v.* Trigg, 1 Bro. C. C. 144.

[12] Prevost *v.* Clarke, 2 Mad. 458; Taylor *v.* George, 2 V. & B. 378.

[13] See Harding *v.* Glyn, 2 Lead. Cas. Eq. 950 (4th Eng ed.) and notes.

From the decisions upon this subject, and from the principles upon which the general law of trusts is based, certain rules may be derived by which the construction of instruments containing precatory expressions is to be governed. The question in all cases is whether a trust was or was not intended to be created, or, in other words, whether the testator designed to leave the application or non-application of the subject-matter of the bequest to the designated object entirely to the discretion of the donee, or whether his meaning was that his language should be deemed imperative, and that such discretion should be excluded. This is usually considered, by the best authorities, to depend upon three things: *first*, upon the general terms of the will; *secondly*, upon the certainty of the subject-matter; and *thirdly*, upon the certainty of the object.[1]

74. *First.* Precatory expressions ought, *primâ facie*, to be considered as imperative and to exclude discretion; the wish of a testator, no matter how expressed, if expressed clearly, should be regarded as a command. This is the opinion of Lord Redesdale in Cary *v.* Cary;[2] and although the dicta in some subsequent cases[3] would seem to be in favor of giving a less decided effect to words of recommendation or request, yet it is conceived that the above statement of the rule is justified by the best considered decisions both in England and in this country.[4] It is seldom, indeed, that expressions of this nature are found standing alone, and not strengthened, or qualified, or controlled by the context, but when they *do* stand alone they ought to be considered as imposing an obligation, and not merely as constituting a request which the person to whom it is addressed is at liberty to disregard. The reason is obvious. A will, in its very nature, is the disposition which the testator desires to have made of his estate after his death. All expressions in it indicative of his wish or will are commands.[5] As a matter of course,

[1] Briggs *v.* Penny, 3 MacN. & G. 546; Stead *v.* Mellor, 5 Ch. Div. 227; Lines *v.* Darden, 5 Florida, 51; notes to Harding *v.* Glyn, 2 Lead. Cas. Eq. *ut sup.*

[2] 2 Scho. & Lef. 189.

[3] See Knight *v.* Boughton, 11 Cl. & F. 513; Williams *v.* Williams, 1 Sim. N. R. 358.

[4] Bernard *v.* Minshull, Johns. 276; Shovelton *v.* Shovelton, 32 Beav. 145; Warner *v.* Bates, 98 Mass. 274; Hawkins on Wills, 160.

[5] Burt *v.* Herron, 16 P. F. Sm 402.

the *primâ facies* of a trust, established by the use of precatory words, is liable to be rebutted by any other expressions which indicate an intention on the part of the testator that they should not be taken in an imperative sense; in other words, this particular canon of construction, now under consideration, is, like all others, subordinate to the general rule that the *intention* of the testator as gathered from the whole will is to govern.[1]

It is to be observed here, that mere discretion as to the distribution of the subject-matter of the bequest among the designated objects, or a discretion as to the selection of a recipient of the testator's bounty out of a particular class, will not detract from the imperative character of precatory expressions, and the donee will be considered as a trustee with a power of distribution or selection.[2]

75. *Secondly.* The determination of the question whether or not discretion has been excluded, often depends upon the degree of certainty with which the objects of the supposed bounty are pointed out. If, for example, a gift is bestowed coupled with a suggestion or recommendation that it be applied by the donee to objects which are vaguely and imperfectly described, this vagueness will be regarded by the court as tending to show that the application or non-application of the gift was to be left to the option of the donee. It is true, indeed, that certainty is required in all trusts, no matter how they may be created. "To constitute a valid trust," said Sir William Grant, M. R., in Cruwys *v.* Colman,[3] "undoubtedly three circumstances must concur: sufficient words to raise it, a definite subject, and a certain or ascertained object." There is, however, this difference between trusts created by technical words and those raised by expressions of recommendation and request. In the former, if the trust fail for want of certainty in the objects, the trustee will not hold beneficially, but there will be a resulting trust in favor of the donor or his estate; in the latter this uncertainty

[1] Eaton *v.* Watts, L. R., 4 Eq. 151, 155; Young *v.* Martin, 2 Y. & C. 582; Brunson *v.* King, 2 Hill Ch. 490; Van Amee *v.* Jackson, 35 Vt. 177; Negroes Chase *et al. v.* Plummer, 17 Md. 165; Spooner *v.* Lovejoy, 108 Mass. 533; Bacon *v.* Ransom, 139 Mass. 117; Biddle's Appeal, 30 P. F. Sm. 258.

[2] Shovelton *v.* Shovelton, 32 Beav. 143; Harding *v.* Glyn, 1 Atk. 469; 2 Lead. Cas. Eq. 950 (4th Eng. ed.).

[3] 9 Vesey, 323.

will, in many instances, take away entirely from the gift its fiduciary character, and cause it to vest beneficially in the donee. In one case a trust is created, but fails for want of certainty in its objects; in the other the want of certainty is *evidence* to show that the donor had never intended to create a trust. "Wherever," says the Lord Chancellor, in Morice *v.* The Bishop of Durham,[1] "the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will not expressly creating a trust, the indefinite nature and quantum of the subject, and the indefinite nature of the objects are always used by the court as *evidence* that the mind of the testator was not to create a trust;" and this rule has been acted upon in many cases.[2] But, although uncertainty in the objects is *evidence* to show that a trust was not intended, it is by no means *conclusive* evidence; for if the precatory words are strong, and not qualified by other expressions, the legatee or devisee will not take beneficially although the trust should fail for want of certainty in the object; and still more so will this be the case, if other provisions in the will indicate the intention of the testator to be that the donee should take only as a trustee.[3]

76. *Thirdly.* The certainty with which the subject of the bequest or devise is described must also be taken into consideration. It very often happens that a testator gives property to one person with a request or hope that after the decease of the first taker the "surplus" (describing it by this or some other uncertain word) shall be distributed among some designated objects. It has been held that such terms indicate a desire on the part of the testator that the first taker should have absolute control over the property, and that its ultimate disposition should depend entirely upon his discretion.[4] But any words

[1] 10 Vesey, 536.

[2] Harland *v.* Trigg, 1 Bro. C. C. 142; Meredith *v.* Heneage, 1 Sim. 542; Harper *v.* Phelps, 21 Conn. 259; Hood *v.* Oglander, 34 L. J. Ch. 528; Tolson *v.* Tolson, 10 G. & J. 159.

[3] Bernard *v.* Minshull, Johns. 276; Ingram *v.* Fraley, 29 Ga. 553; Hill on Trustees, 110 (4th Am. ed.), notes. The rule laid down in Briggs *v.* Penny, 3 MacN. & G. 546, on this subject has not met with entire approval. See Hawkins on Wills, 160

[4] Knight *v.* Boughton, 11 Clark & F. 513; Pennock's Estate, 8 Harris, 268; Cowman *v.* Harrison, 10 Hare, 234; Palmer *v.* Simmonds, 2 Dr. 221; Smith *v.* Bell, Mart. & Yerg. 302; Constable

which point out clearly what the property is to which the trust is intended to apply will be sufficient, no matter how untechnical and unartificial they may be.[1]

It may, perhaps, be doubted whether this doctrine of precatory trusts should be extended to conveyances *inter vivos*. It was, nevertheless, so extended in Liddard *v.* Liddard,[2] by the Master of the Rolls, Lord Romilly.

77. It sometimes happens that a trust is created, of which the subject is not, strictly speaking, property, but only a power or authority to dispose of property. A power is usually defined to be an authority whereby a person is enabled to dispose of an interest vested either in himself or in another. The exercise of these powers, in most instances, depends upon the discretion of the donee of the power, and no person can take by virtue of the power unless the donee thereof chooses to exercise this discretion. But there are also powers which partake of the nature of trusts. "There are not only a mere trust and a mere power," said Lord Eldon, in Brown *v.* Higgs[3] (which is the leading authority upon the subject of powers in trust), "but there is also known to this court a power which the party to whom it is given is entrusted and required to execute; and with regard to that species of power the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the court will to a certain extent discharge the duty in his own room and place."[4] This rule has been followed both in England and in the United States.[5] If the donee of a power in trust chooses to

v. Bull, 3 De G. & Sm. 411; Hill on Trustees, 119 (4th Am. ed.). See the rules upon the subject of precatory trusts stated in Hill on Trustees, 73 (4th Am. ed.), and approved in Perry on Trusts, § 114, note.

[1] Cruyws *v.* Colman, 9 Ves. 319; Hill on Trustees 74.

[2] 28 Beav. 266.

[3] 8 Vesey, 570; 4 Vesey, 708; 5 Vesey, 495.

[4] See, also, Harding *v.* Glyn, 1 Atk. 469; Cole *v.* Wade, 16 Vesey, 42.

[5] Brown *v.* Pocock, 6 Sim. 257; Croft *v.* Adam, 12 Sim. 639; Salusbury *v.* Denton, 3 K. & J. 529; In re Caplin's Will, 34 L. J. Ch. N. S. 578; Penny *v.* Turner, 2 Phil. 493; Fordyce *v.* Bridges, Id. 497; White's Trusts, Johns. 656; Minors *v.* Batteson, L. R. 1 App. Cas. 428; Withers *v.* Yeadon, 1 Rich. Eq. 324; Collins *v.* Carlisle, 7 B. Mon. 14; Gibbs *v.* Marsh, 2 Metcalf. 243; Miller *v.* Meetch, 8 Barr, 417; Smith *v.* Bowen, 35 New York, 83; Whiting *v.* Whiting, 4 Gray, 240; Chasè *v.* Chase, 2 Allen, 101; Perry on Trusts, § 248, *et seq.*

exercise the power, he can select, at his discretion, any one of the designated class.[1] If he makes no selection, a court of chancery will not attempt to exercise any discretion, but will make equal distribution among the parties who constitute the favored class.[2] Thus, in the case of Saulsbury *v.* Denton,[3] a testator gave a fund to his widow to be disposed of by her partly to charity, and partly among such relations as she should select. Upon the death of the widow without exercising the power, it was held that the charity was entitled to one moiety of the fund, and that the other should be divided among those entitled under the statute of distributions.

In those cases in which the execution of the power is not to take effect out of an interest conferred upon the donee of the power, the courts have exhibited greater reluctance in favoring the power, than in those cases in which the donee of the power would be entitled beneficially in default of the execution of the power; because in the latter case there would be an intention of the testator to qualify the gift to the donee of the power, which would be defeated, whereas no such intention can be presumed to exist where the donee of the power has no interest in the estate.[4] However, the tendency of the courts is now towards favoring the objects of the power.[5]

No trust will be construed to exist where there is nothing to show with certainty in whose favor, or in what shares, a gift was intended.[6]

[1] In Willis *v.* Kymer, 7 Ch. D. 183 (a case of the first impression), it was decided by Jessel, M. R., that where a trust had been created by will in favor of "children" *simpliciter*, the trustee might, in executing the trust, limit the shares of the daughters to their separate use. The trust in that case was created by precatory words.

[2] A Court of Chancery will not interfere with discretion in cases of private trusts and *a fortiori* in those of a public character. Haight *v.* Day, 1 Johns. Ch. 21. See also Naglee's Est., 2 P. F. Sm. 159.

[3] 3 K. & J. 529.

[4] Hill on Trustees, 68; Harding *v.* Glyn, 1 Atk. 468; Brown *v.* Higgs, 4 Ves. Jr. 708; s. c., 8 Ves. 561; Bull *v.* Vardy, 1 Ves. 271; 2 Sudg. Pow. 177; Duke of Marlborough *v.* Godolphin, 2 Ves. Sr. 61; Crossling *v.* Crossling, 2 Cox, 396.

[5] Hill on Trustees, 69.

[6] In re Eddowes, 1 Dr. & Sm. 395.

CHAPTER III.

IMPLIED TRUSTS.

78. Implied Trusts of two kinds: Resulting Trusts and Constructive Trusts.
79. Resulting Trusts of four kinds.
80. Purchase-money paid by one; title taken in name of another.
81. Requisites to such a trust.
82. Statute of Frauds.
83. Parol evidence admissible.
84. Advancements.
85. Trusts of this kind abolished in certain States.
86. Purchases by Trustees with trust funds.
87. Conveyance where trust is not declared or fails.
88. Where the beneficial interest is not exhausted.
89. Exceptions in favor of charities.
90. Conveyances without consideration.
91. Constructive trusts.
92. Trustee cannot acquire rights antagonistic to *cestui que trust.*
93. Extent of this rule.
94. Trustee cannot purchase at his own sale.
95. Other Constructive Trusts.

78. Trusts by implication of law may arise either for the purpose of carrying out the presumed intention of the parties, or they may be entirely independent of, or even contrary to, intention. Trusts of the first class are said to *result* by operation or presumption of law from certain acts or relations of parties from which an intention to create a trust is supposed to exist, and they are, therefore, called *Resulting* or *Presumptive* Trusts. Trusts of the second class exist purely by construction of law, without any actual or supposed *intention* that a trust should be created, but merely for the purpose of asserting rights of parties, or of frustrating fraud. They are termed, therefore, *Constructive* Trusts.

79. Resulting trusts may arise in several ways, and may be conveniently divided into the following classes: (1.) where a purchaser pays the purchase-money, but takes the title in the name of another; (2) where a trustee or other fiduciary buys property in his own name, but with trust funds; (3) where the trusts of a conveyance are not declared, or are only partially declared, or fail; and (4) where a conveyance is made without any consider-

ation, and it appears from circumstances that the grantee was not intended to take beneficially.

80. The nature of resulting trusts of the first of the above classes was clearly stated by Lord Chief Baron Eyre in the leading case of Dyer *v.* Dyer,[1] and his language has been approved and followed both in England and in this country. "The result of all the cases," he says, "without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or successive, results to the man who advances the purchase-money." To illustrate the doctrine thus stated, suppose A. advances the purchase-money of an estate, and a conveyance of the legal interest in it is made either to B., or to B. and C., or to A., B. and C. jointly, or to A., B. and C. successively. In all these cases, if B. and C. are strangers, a trust will result in favor of A.[2]

The reason of this doctrine is, that the man who pays the purchase-money is supposed to become, or to intend to become, the owner of the property, and the beneficial title follows that supposed intention.

This doctrine is in analogy to the common-law rule that

[1] 2 Cox, 92; 1 Lead. Cas. Eq. 165; 203 (4th Eng. ed.). See Buck *v.* Pike, 2 Fairfield, 9; Page *v.* Page, 8 N. Hamp. 187; Pinney *v.* Fellows, 15 Verm. 525; Clark *v.* Clark, 43 Id. 685; Boyd *v.* McLean, 1 Johns. Ch. 582; Buffalo, etc., R. R. Co. *v.* Lampson, 47 Barb. 533; Depeyster *v.* Gould, 2 Green, Ch. 480; Stratton *v.* Dialogue, 1 C. E. Green, 70; Jackman *v.* Ringland, 4 Watts & Serg. 149; Williard *v.* Williard, 6 P. F. Sm. 119; Bickel's Appeal, 5 Norris, 204; Hollis *v.* Hayes, 1 Maryl. Ch. 479; Newells *v.* Morgan, 3 Harring. 229; Cecil Bank *v.* Snively, 23 Maryl. 261; Bank of United States *v.* Carrington, 7 Leigh, 566; Powell *v.* Powell, 1 Freem. Ch. 134; Thomas *v.* Walker, 6 Humph. 93; Butler *v.* Rutledge, 2 Coldwell, 4; Perry *v.* Head, 1 A. K. Marsh. 47; Snelling *v.* Utterback, 1 Bibb, 609; Martin *v.* Martin, 5 Bush, 54; Gass *v.* Gass, 1 Heisk. 613; Sandford *v.* Weeden, 2 Id. 71; Elliott *v.* Armstrong, 2 Blackf. 198; Paul *v.* Chouteau, 14 Missouri, 580; Tarpley *v.* Poage's Adm'r., 2 Texas, 150; Smith *v.* Boquet, 27 Id. 507; Robinson *v.* Robinson, 22 Iowa, 427; Kane Co. *v.* Herrington, 50 Ill. 232; Perry on Trusts, 98, § 126; 2 Sug. V. & P. 701 (8th Am. ed.). See, also, Williams *v.* Brown, 14 Ill. 200; Nichols *v.* Thornton, 16 Id. 113; Creed *v.* Lancaster Bank, 1 Ohio St. R. 1; Barron *v.* Barron, 24 Verm. 375; Beck *v.* Graybill, 4 Casey, 66; Kisler *v* Kisler, 2 Watts, 323; Jenison *v.* Graves, 2 Black. 141; Bear *v.* Koenigstein, 16 Neb. 65.

[2] 1 Lead. Cas. in Eq. 173.

where there is a feoffment without consideration, the use will result to the feoffor.[1]

It applies to both realty and personalty;[2] and trusts of this nature are expressly excepted out of the statute of frauds.[3] Where, however, an agent buys land for his principal, and not only takes the conveyance in his own name, but also pays the price out *of his own funds*, no resulting trust will arise, and the case will fall within the statute of frauds, because in such a case there is no payment of the purchase-money upon which the right of the principal can rest, but that right is dependent solely upon the verbal promise of the agent.[4] Where no money is advanced, and there is nothing more in the transaction than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee.[5] A resulting trust of this kind must arise, if at all, from the payment of the purchase-money, at the time of the conveyance.[6] If an express agreement is relied upon, it necessarily excludes the idea of any trust arising purely by implication of law. Such a trust will, therefore, be an express trust, and will fall directly within the statute of

[1] Per Eyre, C. B., in Dyer *v.* Dyer.

[2] But not, it is said, to perishable property; Union Bank *v.* Baker, 8 Hump. 447; Perry on Trusts, § 130; nor to a mere *claim* to property; Mandeville *v.* Solomon, 53 Cal. 38.

[3] 29 Car. II., c. 3, § 8. In Hoxie *v.* Carr, 1 Sum. 187, it was said by Judge Story, that the exception of resulting trusts from the statute of frauds was merely in affirmance of the general law; and that, therefore, in Rhode Island, where the exception did not exist, the rule was the same as in England. This was followed in McGuire *v.* Ramsey, 4 Eng. (Ark.) 525.

[4] Bartlett v. Pickersgill, 1 Eden, 515; 1 Cox. 15; Dorsey *v.* Clarke, 4 Har. & J. 557; Jackman *v.* Ringland, 4 W. & S. 149; Fox *v.* Heffner, 1 Id. 372; Sample *v.* Coulson, 9 Id. 62; Robertson *v.* Robertson, 9 Watts, 42; Lloyd *v.* Lynch, 4 Casey, 419; O'Hara *v.* Dilworth, 22 P. F. Sm. 403; Hill on Trustees, 96; Perry on Trusts, § 135; Sugd. V. & P. 703. See, also, Taliaferro *v.* Taliaferro, 6 Alab. 404; Irwin *v.* Ivers, 7 Ind. 308; Minot *v.* Mitchell, 30 Id. 228; Kisler *v.* Kisler, 2 Watts, 323; Skillman *v.* Skillman, 2 McCart. 478; Homer *v.* Homer, 107 Mass. 82. In Heard *v.* Pilley, L. R., 4 Ch. 548, some doubts are expressed as to the correctness of the decision in Bartlett *v.* Pickersgill. In Follansbe *v.* Kilbreth, 17 Ill. 522, Hidden *v.* Jordan, 21 Cal. 92, and Chastain *v.* Smith, 30 Ga. 96, it was held that the trust could be enforced.

[5] Williard *v.* Williard, 6 P. F. Sm. 125; Green *v.* Drummond, 31 Maryl. 71; Dollar Savings Bank *v.* Bennett, 26 P. F. Sm. 402; Kellum *v.* Smith, 9 Casey, 164; Kistler's Appeal, 23 P. F. Sm. 398; Walker *v.* Brungard, 13 Smedes & Marsh. 723, 765; Hackney *v.* Butts, 41 Ark. 393.

[6] See Gerry *v.* Stimson, 60 Maine, 189, and Roberts *v.* Ware, 40 Cal. 637.

frauds.[1] But where funds are furnished to the agent, the mere fact that they cannot be traced distinctly into the land will not prevent a trust from resulting.[2]

81. The person in whose favor a trust is claimed to result must pay the purchase-money *as his own;* if he merely advances it as a loan, no trust will result.[3]

If the purchase-money is paid by several, and the title taken in the name of one, a trust will result to the others in proportion to the amount paid by each.[4] But to create a resulting trust in such a case, the payment must be of *some definite part* of the purchase-money.[5] In some cases it has been held that where there is no evidence as to the amount advanced by each party, the presumption will arise that they have furnished the purchase-money in equal proportions.[6] In England the presumption seems to be that when money is advanced in equal proportions, a joint tenancy is supposed to have been contemplated with equal chance

[1] Lead. Cas. Eq. 216 (14th Eng. ed.); Gibson *v.* Foote, 40 Miss. 792; Sheldon *v.* Harding, 44 Ill. 68; Lowry *v.* McGee, 3 Head, 274; Snyder *v.* Wolford, 33 Minn. 175; Farnham *v.* Clements, 51 Maine, 426; Kingsbury *v.* Burnside, 58 Ill. 328; though see Harrold *v.* Lane, 3 P. F. Sm. 268; Cohn *v.* Chapman, Phillips (N. C.) Eq. 92; Hall *v.* Congdon, 56 N. H. 279; and Barnard *v.* Bougard, Harring. Ch. 143.

[2] See Frank's Appeal, 9 P. F. Sm. 194; Sanfoss *v.* Jones, 35 Cal. 422; Price *v.* Reeves, Id. 457; Malloy *v.* Malloy, 5 Bush, 465.

[3] Bartlett *v.* Pickersgill (*supra*); Aveling *v.* Knipe, 19 Ves. 445; Wheeler *v.* Kirtland, 8 C. E. Green, 22; Milliken *v.* Ham. 36 Ind. 166; Six *v.* Shaner, 26 Maryl. 444; Gibson *v.* Foote, 40 Miss. 788. When a purchase is made on the credit of two, and the money is paid by one only, there will be no resulting trust; Brooks *v.* Fowle, 14 N. Hamp. 248.

[4] Botsford *v.* Burr, 2 Johns. Ch. 410; Union Col. *v.* Wheeler, 59 Barb. 585; Pierce *v.* Pierce, 7 B. Mon. 433; Honore *v.* Hutchings, 8 Bush, 693; Shoemaker *v.* Smith, 11 Hump. 81; Purdy *v.* Purdy, 3 Maryl. Ch. 547; Seaman *v.* Cook, 14 Ill. 501; Latham *v.* Henderson, 47 Id. 185; Fleming *v.* McHale, Id. 282; Brothers *v.* Porter, 6 B. Mon. 106; Smith *v.* Wright, 49 Ill. 403; King *v.* Hamilton, 16 Id. 190; Morey *v.* Herrick, 6 Harris, (Pa.) 129; Tebbetts *v.* Tilton, 11 Foster, 273; Case *v.* Codding, 38 Cal. 193; Hill on Trustees, (4th Am. ed.) 149; Perry on Trusts, § 132; Sugden V. & P. 701 (8th Am. ed.). Though a contrary doctrine seems to have been held in Barnard *v.* Bougard, Harring. Ch. 143, and Coppage *v.* Barnett, 34 Miss. 621.

[5] Baker *v.* Vining, 30 Maine, 127, Dudley *v.* Bachelder, 53 Id. 408; McGowan *v.* McGowan, 14 Grey, 119, Wheeler *v.* Kirtland, 8 C. E. Green, 22; Sayre *v.* Townsends, 15 Wend. 647; Reynolds *v.* Morris, 17 Ohio St. (N. S.) 510.

[6] Shoemaker *v.* Smith, 11 Hump. 81; Edwards *v.* Edwards, 3 Wright, (Pa.) 386.

of survivorship to all; but as survivorship has been removed as an incident to joint tenancy in most of the States of the Union, such a presumption would not probably arise in America.[1]

It is said in Sugden on Vendors, that where two agree to buy land, and the title is taken in the name of both, but one pays the whole consideration, no trust will result in his favor, but he will only have a right of contribution.[2]

It is not necessary that the consideration which moves from the *cestui que trust* should be *money;* it may consist of anything of value; and a trust will be decreed in favor of him who is the source of the consideration, whether it be lands, goods, money, securities or credit.[3]

82. The language of the Statute of Frauds upon the subject of resulting trusts is that, "where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if the statute had not been made."[4] It will be observed that the statute speaks of "any *conveyance* * * * by which a trust shall arise." It has accordingly been held that a resulting trust cannot arise unless some transmission of title has taken place. Thus in a Minnesota case, where the statute abolishing resulting trusts, nevertheless preserves them in favor of the existing creditors of the person paying the consideration, it was held that no trust would result where there has been no actual conveyance by the person from whom the debtor had purchased.[5]

It is also essential to a resulting trust that the money should be paid at the time of the purchase; a subsequent payment cannot raise a trust.[6]

[1] Hill on Trustees, 93; Adams Eq. 34.

[2] Sugden V. and P. 700 (8th Am. ed.).

[3] Blodgett *v.* Hildreth, 103 Mass. 484; Clark *v.* Clark, 43 Verm. 685; Blauvelt *v.* Ackerman, 5 C. E. Green, 141; Peabody *v.* Tarbell, 2 Cush. 226; 1 Lead. Cas. Eq. (4th Am. ed.).

[4] Stat. 29 Car. II., c. 3, § 8.

[5] Durfee *v.* Pavitt, 14 Minn. 430. See also Jackson *v.* Morse, 16 Johns. R. 197; Green *v.* Drummond, 31 Maryl. 81.

[6] Foster *v.* The Trustees, 3 Alab. 302; Mahorner *v.* Harrison, 13 Sm. & Marsh, 53; Barnard *v.* Jewett, 97 Mass. 87; Cutler *v.* Tuttle, 4 C. E.

Resulting trusts will not arise against the positive provisions of a statute, or in contravention of public policy. Thus, it has been decided, under the English registration acts, that the doctrine is not applicable to the case of a vessel purchased and paid for by one man, but registered in the name of another.[1] And so, too, a resulting trust cannot be enforced by an alien in opposition to statutes, forbidding or circumscribing his right to hold property.[2]

And if the title to property is taken in the name of a third party for the purpose of defrauding the creditor of the party who pays the purchase-money, equity will not assist him in enforcing a resulting trust, for to do so would be to aid a fraud.[3]

The interest of the real purchaser, however, will be subject to the claims of his creditors.[4]

83. It must be remembered that the trusts now under consideration rest upon *presumption* merely, and that this presumption is not one *juris et de jure*, but of fact merely, and open to rebuttal. All the facts and circumstances attendant upon the transaction may be proved for the purpose of showing what the intention of the parties really was;[5] as that the nominal purchaser was the real beneficiary, that the pretended owner was of such mean circumstances as to make it impossible for him to have been the purchaser,[6] that the purchase-money was advanced by the party paying it as a loan to the party in whose name the legal title was taken, and not for the purpose of acquiring the ownership himself, and the like. Hence, it is well settled that parol evidence is admissible both to create

Green, 549; Tunnard *v.* Littell, 8 Id. 267; Capers *v.* McCaa, 41 Miss. 488; Frederick *v.* Haas, 5 Nev. 389; Bostford *v.* Burr, 2 Johns. Ch. 408; Nixon's Appeal, 13 P. F. Sm. 282; Purdy *v.* Purdy, 3 Maryl. Ch. 547; Latham *v.* Henderson, 47 Ill. 185; Rogers *v.* Murray, 3 Paige, 390; Perry on Trusts, § 133.

[1] Hill on Trustees, 93, 94.

[2] Leggett *v.* Dubois, 5 Paige, 114; Hubbard *v.* Goodwin, 3 Leigh, 492; Perry on Trusts, § 131; Sugden, V. and P. 701.

[3] Ford *v.* Lewis, 10 B. Mon. 127 Proseus *v.* McIntyre, 5 Barb. 425; Baldwin *v.* Campfield, 4 Hals. Ch. 891.

[4] Guthrie *v.* Gardner, 19 Wend. 414; Kimmel *v.* McRight, 2 Barr, 38; Hill on Trustees, 164 (4th Am. ed.).

[5] Byers *v.* Danley, 27 Ark. 88.

[6] Willis *v.* Willis 2 Atk. 71; Sug. V. and P. 702 (8th Am. ed.); Farrell *v.* Lloyd, 19 P. F. Sm. 247; though see Balbec *v.* Donaldson, 2 Gr. Cas. 459.

and to rebut the presumption of a resulting trust.[1] Parol evidence is admissible to establish a trust in contradiction of the terms of a deed;[2] and even (it is now held) after the death of the nominal purchaser.[3]

Parol evidence is also admissible against the answer of the nominal purchases, although the testimony to establish a trust in such a case must be very strong.[4]

To establish a trust by parol, the evidence must be full, clear, and convincing;[5] though the application of this rule will, of course, be modified by circumstances.[6]

Where the purchase-money is paid by one man, and the title taken in the name of another for fraudulent purposes, *e. g.*, in order to defeat or delay creditors, equity (as already stated) will not assist the perpetrator of the fraud, and consequently will

[1] Boyd *v.* McLean, 1 Johns. C. R. 582; Kendall *v.* Mann, 11 Allen, 15; Blodgett *v.* Hildreth, 103 Mass. 487; DePeyster *v.* Gould, 2 Green Ch. 480; Swinburne *v.* Swinburne, 28 N. Y. 568; Jackman *v.* Ringland, 4 Watts & Serg. 149; Myers *v.* Myers, 1 Casey, 100; Livermore *v.* Aldrich, 5 Cush. 431; Hollis *v.* Hayes, 1 Maryl. Ch. 479; Dryden *v.* Hanway, 31 Maryl. 254; Bank of United States *v.* Carrington, 7 Leigh, 566; McGuire *v.* McGowen, 4 Dess. 486; Letcher *v.* Letcher, 4 J. J. Marsh. 593; Faris *v.* Dunn, 7 Bush, 276; Creed *v.* Lancaster Bank, 1 Ohio St. (N. S.) 1; Lewis *v.* White, 16 Id. 444; Elliott *v.* Armstrong, 2 Blackf. 198; Sanford *v.* Weeden, 2 Heish. 71.

[2] Buck *v.* Pike, 2 Fairfield, 9; Page *v.* Page, 8 N. Hamp. 187; Pinney *v.* Fellows, 15 Verm. 525; Peabody *v.* Tarbell, 2 Cush. 232. Note to Dyer *v.* Dyer, 1 Lead. Cas. Eq. *213.

[3] Boyd *v.* McLean, 1 Johns. Ch. 582; McCammon *v.* Pettitt, 3 Sneed, 242; Fausler *v.* Jones, 7 Ind. 277; Williams *v.* Hollingsworth, 1 Strob. Eq. 103; Perry on Trusts, § 138.

[4] Boyd *v.* McLean, 1 Johns. Ch. 582; Page *v.* Page, 8 N. Hamp. 187; Moore *v.* Moore, 38 Id. 382; Elliott *v.* Armstrong, 2 Black. 199; Jenison *v.* Graves, Id. 441; Blair *v.* Bass, 4 Id. 540; Snelling *v.* Utterback, 1 Bibb, 609; Larkens *v.* Rhoads, 5 Porter, 196; Enos *v.* Hunter, 4 Gilman, 211; Smith *v.* Sackett, 5 Id. 544; Hill on Trustees, (4th ed.) 133.

[5] Baker *v.* Vining, 30 Maine, 127; Boyd *v.* McLean, 1 Johns. Ch. 582; Lloyd v. Lynch, 4 Casey, 419; Bennett *v.* Fulmer, 13 Wright, 155; Farrell *v.* Lloyd, 19 P. F. Sm. 247; McGinity *v.* McGinity, 13 Id. 39; Kistler's Appeal, 23 Id. 393; Nixon's Appeal, 13 Id. 279; Faringer *v.* Ramsay, 2 Maryl. 365; Jenison *v.* Graves, 2 Blackf. 440; Holder *v.* Nunnelly, 2 Cold. 288; White *v.* Sheldon, 4 Nevada, 280; Frederick *v.* Haas, 5 Id. 389; Greer *v.* Baughman, 13 Maryl. 257; Phelps *v.* Seely, 22 Grat. 589; Kendall *v.* Mann, 11 Allen, 15; Olive *v.* Dougherty, 3 Greene, Iowa, 371; Miller *v.* Stokely, 5 Ohio St. (N. S.) 194; Johnson *v.* Quarles, 5 Post, (Mo.) 423; Tunnard *v.* Littell, 8 C. E. Green, 267; Parmlee *v.* Sloan, 37 Ind. 482.

[6] Snell *v.* Elam, 2 Heisk. 82.

decline to enforce the trust which would otherwise result, were the transaction a *bona fide* one, for his benefit.[1] This is only the application of the maxim that he who comes into equity must do so with clean hands; as will be found more fully explained hereafter under the head of Fraud.[2]

84. An exception to the general doctrine of resulting trusts occurs in the case of advancements.

Advancement is a term which has, in law, several meanings. Its signification in the present connection is a gift from a parent to a child, which is supposed to be intended when the purchase-money is paid by the parent, and the conveyance is taken in the name of the child. The ordinary presumption of a resulting trust, already described, is in such a case rebutted by the supposed intention to benefit the child; and instead of the latter holding as trustee for the parent, he will be construed to take beneficially by advancement.[3] Dyer *v.* Dyer, already cited,[4] is an authority upon this particular branch of the law of resulting trusts. In that case copyhold premises were granted to Simon Dyer, and Mary his wife, and his son William, to take in succession for their lives, and to the longest liver of them, the purchase-money having been paid by the father. The wife died, and then the father, leaving surviving him William and another son, to whom he had devised the copyhold estate. Upon a bill filed by this younger son against his brother William, it was held that the latter could not be treated as a trustee of the legal title for the benefit of his father's devisee, but that he took beneficially by way of advancement; and the bill was dismissed.

The doctrine of advancement is firmly established in the United States as well as in England; and the general rule may be stated to be that a purchase in the name of a child will be

[1] Baldwin *v.* Campfield, 4 Halst. Ch. 891; Vanzant *v.* Davies, 6 Ohio N. S. 52; Murphy *v.* Hubert, 4 Harris, 50; Brantley *v.* West, 27 Alab. 542. See also Leggett *v.* Dubois, 5 Paige, 114; Philips *v.* Crammond, 2 Wash. C. C. 441; Alsworth *v.* Cordtz, 31 Miss. 32.

[2] *Post*, § 208, and authorities cited.

[3] As the general doctrine of resulting trusts is analogous to the common-law rule that where there is a feoffment without consideration, the use results to the feoffor, so the exception as to advancements, now under consideration, is in accordance with the legal principle that where there is a feoffment from a father to a son, the consideration of blood would settle the use on the son. Grey *v.* Grey, 2 Swans. 598.

[4] *Ante*, p. 119.

regarded *prima facie* as an advancement, and not as a resulting trust for the father.[1] The rule applies to other relations than those of father and child. A purchase by any one in the name of another to whom the purchaser stands in *loco parentis* will be treated as an advancement. Thus the rule has been held to apply to grandfather and grandchild;[2] to mother and daughter;[3] to husband and wife;[4] to a purchase in the name of a son-in-law;[5] and, in short, to a purchase in the name of any one to whom the party paying the consideration-money stands in *loco parentis*.[6] A purchase in the name of a brother will not be considered an advancement;[7] unless the purchaser stands in *loco parentis* towards his brother.[8]

It seems to be doubtful whether a purchase in the name of an illegitimate child is to be treated as an advancement; although the weight of authority is in favor of so treating it.[9]

Where the money is advanced by a son and the title taken in the name of the father, the presumption will be in favor of a resulting trust, and not an advancement,[10] and where land was conveyed to a husband, the father of the wife paying the purchase-money and declaring it to be the advancement, it was held that a trust resulted in favor of the wife.[11]

Whether a purchase made by a father in the *joint* names of

[1] Page *v.* Page, 8 N. Hamp. 187; Dennison *v.* Goehring, 7 Barr, 180, note; Wheeler *v.* Kidder, 105 Pa. St. 173; Taylor *v.* James, 4 Dess. 1; Douglass *v.* Brice, 4 Rich. Eq. 322; Astreen *v.* Flanagan, 3 Edw. Ch. 279; Partridge *v.* Havens, 10 Paige, (Ch.) 618; Welton *v.* Divine, 20 Barb. 9; Doyle *v.* Sleeper, 1 Dana, 536; Taylor *v.* Taylor, 4 Gilm. 303; Cartwright *v.* Wise, 14 Ill. 417; Shepherd *v.* White, 10 Tex. 721; Alexander *v.* Warram, 17 Missouri, 236; Baker *v.* Leathers, 3 Ind. 557; Perry on Trusts, § 143 *et seq.*; Hill on Trustees, 97 *et seq.*

[2] Ebrand *v.* Dancer, 1 Coll. Ch. 265 n.

[3] Murphy *v.* Nathans, 10 Wright, (Pa.) 508; Sayre *v.* Hughes, L. R., 5 Eq. 376; though see In re de Visme, 2 De G., J. & Sm. 17; Bennet *v.* Bennet, L. R., 10 Ch. D. 474 (per Sir G. Jessel.)

[4] Guthrie *v.* Gardner, 19 Wend. 414; Whitten *v.* Whitten, 3 Cush. 194; Alexander *v.* Warram, 17 Mo. 228; Fatheree *v.* Fletcher, 31 Miss. 265; Cotton *v.* Woods, 25 Iowa, 43; Kline's Appeal, 3 Wright, (Pa.) 463; Earnest's Appeal, 106 Pa. St. 310.

[5] Baker *v.* Leathers, 3 Porter, (Ind.) 558; see Batstone *v.* Salter, L. R., 10 Ch. 431.

[6] See Jackson *v.* Feller, 2 Wend. 465; Roberts's Appeal, 4 Norris, 84.

[7] Edwards *v.* Edwards, 3 Wright, (Pa.) 377.

[8] Forrest *v.* Forrest, 34 L. J. Ch. 428.

[9] Beckford *v.* Beckford, Loft's Reps. 490; Soar *v.* Foster, 4 K. & J. 152; Tucker *v.* Burrow, 2 Hem. & M. 515.

[10] Howell *v.* Howell, 2 McCart. 75.

[11] Peiffer *v.* Lytle, 8 P. F. Sm. 386.

himself and son will be considered as an advancement has been a doubtful question; but the more recent authorities are in favor of considering it an advancement.[1]

The presumption of advancement being, as Chief Justice Eyre said in Dyer *v.* Dyer, a mere circumstance of evidence, may be rebutted by other evidence or other presumptions tending to show an intention that the child was to hold as a trustee.[2] Thus the relation of solicitor and client has been held to prevent the presumption of an advancement which would otherwise have arisen.[3] And where the deed is taken in the name of a wife for the purpose of defrauding the husband's creditors, a trust will result to the husband so as to make the property liable to his debts.[4]

85. It remains to be noticed that resulting trusts of the kind now under discussion have been abolished in certain States of the Union by statute. Such is the case in New York, Michigan and Wisconsin. So, also, in Massachusetts, Maine, Indiana, Kentucky and Minnesota.[5]

86. The second class of resulting trusts is where a trustee or other fiduciary purchases property with trust funds and takes the title in his own name. In such a case a trust will result by operation of law for the benefit of the trust estate, as the trustee will be presumed to have intended that the purchase should enure to the benefit of the estate. Trust funds may in this way be followed into any property into which they have been invested or converted by the trustee; and this is constantly done by the courts for the benefit and redress of injured *cestuis que trust.*[6]

The rule above stated applies to purchases by a trustee,[7] by a

[1] Grey *v.* Grey, 2 Swanst. 599; Williams *v.* Williams, 32 Beav. 370; Sugd. V. and P. 704 (8th Am. ed.).

[2] Shepherd *v.* White, 10 Texas, 72; Proseus *v.* McIntyre, 5 Barb. 425; Butler *v.* Insurance Co., 14 Alab. 777; Cotton *v.* Woods, 25 Iowa, 30; Hodgson *v.* Macy, 8 Ind. 121.

[3] Garrett *v.* Wilkinson, 2 De G. & Sm. 244. See, also, Wallace *v.* Bowens, 28 Verm. 638; Dudley *v.* Bosworth, 10 Hump. 12; Jackson *v.* Matsdorf, 11 John. 91; Taylor *v.* Taylor, 4 Gilm. 303.

[4] Belford *v.* Crane, 1 C. E. Greene, 265; *post*, Part II., Chap. II.

[5] See Glidewell *v.* Spaugh, 26 Ind. 319; Ruth *v.* Oberbrunner, 40 Wis. 260; Durfee *v.* Pavitt, 14 Minn. 424; Martin *v.* Martin, 5 Bush, 47.

[6] Perry on Trusts, § 127.

[7] Oliver *v.* Piatt, 3 Howard, 401; Harrisburg Bank *v.* Tyler, 3 Watts & Serg. 373: Martin *v.* Greer, 1 Geo. Dec.

partner,[1] an agent appointed to buy,[2] or trustees of a corporation,[3] or an executor,[4] or a committee of a lunatic,[5] or a guardian,[6] or a husband purchasing with avails of his wife's separate estate,[7] or a mortgagor.[8] And the rule applies not only to purchases, but to deposits of money in a bank, to assignments, to transmissions to personal representatives, and to all cases in which the property of the beneficiaries can be traced in spite of any transmutation of form or change of possession.[9]

A resulting trust will also arise when a trustee mixes trust funds with his own, for it will then become the trustee's duty to establish how much of his own money went to the purchase, or the *cestui que trust* will take the whole. This is in accordance with the usual rule upon the subject of confusion of goods.[10] It

118; Moffit *v.* McDonald, 11 Hump. 457; Day *v.* Roth, 18 N. Y. 448; Lathrop *v.* Gilbert, 2 Stockt. 345; Pugh *v.* Pugh, 9 Ind. 132.

[1] Philips *v.* Crammond, 2 Wash. C. C. 441; Piatt *v.* Oliver, 2 McLean, 267; 3 Howard, 401; King *v.* Hamilton, 16 Ill. 190; Coder *v.* Huling, 3 Casey, 84; Baldwin *v.* Johnson, Saxt. 441; Edgar *v.* Donnally, 2 Munf. 387; Pugh *v.* Currie, 5 Ala. 446.

[2] Church *v.* Sterling, 16 Conn. 388; Eshleman *v.* Lewis, 13 Wright, (Pa.) 419. See, also, Hutchinson *v.* Hutchinson, 4 Des. 77; Follansbe *v.* Kilbreth, 17 Ill. 522; Chastain *v.* Smith, 30 Georgia, 96.

[3] Methodist Church *v.* Wood, 5 Hamm. 283.

[4] Claussen *v.* La Franz, 1 Clarke, 226; McCrory *v.* Foster, Id. 271; Wallace *v.* Duffield, 2 Serg. & Rawle, 521; Harper *v.* Archer, 28 Miss. 212.

[5] Reid *v.* Fitch, 11 Barb. S. C. 399.

[6] Caplinger *v.* Stokes, Meigs, 175; Bancroft *v.* Consen, 13 Allen, 50; Johnson *v.* Dougherty, 3 C. E. Green, 406; Durling *v.* Hammar, 5 Id. 220; Turner *v.* Petgrew, 6 Hump. 438; Shelton *v.* Lewis, 27 Ark. 190; Schlaefer *v.* Corson, 52 Barb. 510.

[7] Methodist Church *v.* Jaques, 1 John. Ch. 450; 3 Id. 77; Fillman *v.* Divers, 7 Casey, 429; Marsh *v.* Marsh, 43 Ala. 677; Click *v.* Click, 1 Heisk. 607; Sandford *v.* Weeden, 2 Id. 71; Miller *v.* Edwards, 7 Bush, 394; Resor *v.* Resor, 9 Ind. 347; Barron *v.* Barron, 24 Verm. 375; Pritchard *v.* Wallace, 4 Sneed, 405; Wallace *v.* McCollough, 1 Rich. Eq. 426; Dickinson *v.* Codwise, 1 Sandf. (Ch.) 214; Pinney *v.* Fellows, 15 Verm. 525; Lathrop *v.* Gilbert, 2 Stock. Ch. 345.

[8] McLarren *v.* Brewer, 51 Maine, 402.

[9] See Farmers' & Mechanics' Bank *v.* King, 7 P. F. Sm. 202; Milligan's Appeal, 1 Norris, 389; Moses *v.* Mungatroyd, 1 Johns. Ch. 128; Kirkpatrick *v.* McDonald, 1 Jones, (Pa.) 393: Philips *v.* Crammond, 2 W. C. C. R. 441; Pierce *v.* M'Keehan, 3 W. & S. 280; Taylor *v.* Plumer, 3 M. & S. 562, 574; Pennell *v.* Deffell, 4 De G., M. & G. 389; Story's Eq., §§ 1258–1359; Sheffer *v.* Montgomery, 15 P. F. Sm. 328; First National Bank *v.* Bache, 21 Id. 213.

[10] See Hill on Trustees, 148 (4th Am. ed.), note; Frith *v.* Cartland, 34 L. J. Ch. 301; Pennell *v.* Deffell, 4 De G.,

has been doubted, however, whether the *cestui que trust* in such cases has anything more than a lien on the property to the extent of the money belonging to the trust estate; but the general rule in America is in favor of a resulting trust.[1]

Resulting trusts of the second class may be proved by parol.[2]

87. The third of the classes into which resulting trusts have been divided embraces those cases in which there is a disposition of property upon trust, but no trust is declared, or is only partially declared, or wholly or partially fails. "There is no equitable principle more firmly established than that where a voluntary disposition of property by deed or will is made to a person as trustee, and the trust is not declared at all, or is ineffectually declared, or does not extend to the whole interest given to the trustee, or it fails either wholly or in part by lapse or otherwise; the interest so undisposed of will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself, or for his heir-at-law or next of kin, according to the nature of his estate."[3]

The rule above stated applies, it will be observed, to voluntary dispositions and not to those based upon a valuable consideration,[4] and it is called into operation in the case of wills more frequently than in deeds. The presumption of a resulting trust is, indeed, stronger in a case of a disposition of property by conveyance *inter vivos*, than in a testamentary disposition, which always implies bounty;[5] but the limitations of beneficial interests are usually more precise and exhaustive in deeds than in wills, and a case of an interest undisposed of is not therefore, so likely to arise.

The plainest case of a trust of the kind now attempted to be explained, is that in which a gift is made upon trust but no

M. & G. 372; Ex parte Dale, L. R., 11 Ch. Div. 772; In re Hallett's Est., 13 Ch. Div. 696. See, also, Com. *v.* McAllister, 4 Casey, 480; McAllister *v.* Com., 6 Id. 536; School *v.* Kirwin, 25 Ill. 73; Kip *v.* Bank of N. Y., 10 Johns. 65; Thompson's App., 10 Harris, (Pa.) 16; McLarren *v.* Brewer, 51 Me. 402; Seaman *v.* Cook, 14 Ill. 505; Russell *v.* Jackson, 10 Hare, 209.

[1] Wallace *v.* Duffield, 2 S. & R. 530; Wallace *v.* McCollough, 1 Rich. Eq. 426; Day *v.* Roth, 18 N. Y. 456; Hill on Trustees, 148 (4th Am. ed.), note. In England, see *contra*, In re Pumfrey, 22 Ch. D. 261. See also In re Hallett's Est., (*supra*).

[2] Lench *v.* Lench, 10 Ves. 517; note to Dyer *v.* Dyer, 1 Lead. Cas. Eq. *215.

[3] Hill on Trustees, 113, 114.

[4] Brown *v.* Jones, 1 Atk. 191.

[5] Sydney *v.* Shelley, 19 Ves. 358.

trusts are declared. Of this a striking example is the case of the Corporation of Gloucester *v.* Wood,[1] where a testator gave 200,000*l.* to his executors "for the purpose I have before named," but no purposes had been named, and it was held that there was a resulting trust in favor of the residuary legatees.

An insufficient declaration of trust will have the same effect as an entire failure to declare.[2]

88. A more difficult question not unfrequently arises in those cases in which the gift is made upon trusts which are effectively declared, but which do not exhaust the entire beneficial interest. Here, if the intention is plain that the donee is not to take the undisposed residue beneficially, there will, of course, be a resulting trust in favor of the next of kin, or the heir-at-law, according to the nature of the property; but the difficult point to determine is whether the donee was intended to take the undisposed interest beneficially. Many authorities exist upon this point, and many fine distinctions have been drawn. In Barrs *v.* Fewkes,[3] however, the result of the case is thus stated by the (then) Vice Chancellor, Wood: 1st, where there is a gift to A. to enable him to do something, where he has a choice whether he will do it or not, then the gift is for his own benefit, the motive why it is given to him being stated; 2d, where you find the gift is for the general purposes of the will, then the person who takes the estate cannot take the surplus, after satisfying the trust, for his own benefit; and 3d, where a charge is created by the will, the devisee takes the surplus for his own benefit, no trust being implied.

Another instance of the class of resulting trusts now under consideration is that which arises out of the failure of a gift by lapse. Where, for example, a testator declares a trust in favor of A., and A. dies in the testator's lifetime, the trustee will hold the property for the benefit of the testator's real or personal representatives, according to the nature of the property.[4] So

[1] 3 Hare, 131; 1 H.L. Cas. 272. See also Schmuker's Estate *v.* Reel, 61 Mo. 592, where the subject is carefully discussed.

[2] Hill on Trustees, 116; Morice *v.* Bishop of Durham, 9 Ves. 399; 10 Ves. 522. See, also, Lomax *v.* Ripley, 3 Sm. & Giff. 48; King *v.* Mitchell, 8 Peters, 326; Sheaffer's Appeal, 8 Barr, 38. See, however, Benning *v.* Benning's Exr., 14 B. Mon. 585.

[3] 2 Hem. & M. 60. See, also, Ellcock *v.* Mapp, 3 H. L. Cas. 492; King *v.* Denison, 1 V. & B. 272; William *v.* Roberts, 4 Jur. N. S. 18; Shaeffer's Appeal, 8 Barr, 38; Hill on Trustees, 119.

[4] Hill on Trustees, 135, 136.

too where a gift is void *ab initio* because of its violation of some statutory provision (*e. g.* the statutes against excessive accumulations), or for some illegal purpose, the interest which is thus attempted to be illegally created will result for the benefit of the heir or next of kin.[1]

A resulting trust of personalty will not, however, arise where there is a residuary clause, because that clause ordinarily includes all interests not disposed of at the time of the testator's death.[2] Where, however, the interest which fails constitutes, or forms a part of, the residuary estate, a resulting trust will take place.[3]

It is sometimes difficult to determine for whose benefit the resulting trust takes effect—that is to say, whether for the heir or next of kin. Thus, where real estate is directed to be sold, and the proceeds applied to certain purposes, and there is a partial failure of purposes for which the sale was designed, a question may arise whether the undisposed surplus will go to the next of kin in its new condition of personalty, or to the heir in accordance with its original state. The general rule in England now is that unless there is a conversion out and out and for all purposes, the heir-at-law will take.[4] In America, however, the rule is not so strongly in favor of the heir,[5] and where realty and personalty are mixed in a common fund, and there is a partial failure of a beneficial interest by lapse, the trust which results will enure to the benefit of the personal, and not the real representative of the testator.

89. An exception to the doctrine of resulting trusts of the class now under discussion occurs in the case of a charity. It has already been stated that one of the requisites to the creation of a valid trust is *certainty* in the object to be benefited. If the object of an ordinary trust be not defined with sufficient precision, the gift will fail, and there will, of course, be a resulting trust. But in trusts for charitable uses the rule is otherwise. Uncertainty in the object does not necessarily result in a failure

[1] Johnson *v.* Clarkson, 3 Rich. Eq. 305; Ford *v.* Dangerfield, 8 Id. 95; Drew *v.* Wakefield, 54 Maine, 291; Lusk *v.* Lewis, 32 Miss. 297.

[2] Woolmer's Est., 3 Whart. 477.

[3] Leake *v.* Robinson, 2 Meriv. 392; Hill on Trustees, 136.

[4] Ackroyd *v.* Smithson, 1 Lead. Cas. Eq. 872 (4th Eng. ed.).

[5] Hill on Trustees, 143. *Post*, Part II., Ch. V.

of the gift. Indeed, uncertainty in the object has been said to be a characteristic of a true charitable use.[1]

Therefore, where there is a gift for charitable purposes *generally*, although no particular purpose is declared, or, if declared, does not exhaust the entire interest, there will be no resulting trust, but the general charitable purpose will be carried out by the Court of Chancery.[2]

The principle upon which a court of chancery acts in thus carrying out a general charitable intent is what is known in England as the *cy pres* doctrine—in other words, a doctrine by which the charitable disposition will be effected as nearly as may be. This principle has not been as much favored in the United States as in England, and the exception to the general rule as to resulting trusts is therefore not, perhaps, so broad as in England. The subject will be found noticed under the head of Trusts for Charitable Uses.[3] At present it is sufficient to observe that this exception does exist.

90. The last of the classes into which resulting trusts have been divided is where there is a voluntary conveyance without any consideration, and it appears from circumstances that the grantee was not intended to take beneficially.

According to the ancient doctrine, where a feoffment was made without any consideration, the use resulted to the feoffor; and it was formerly thought that the same rule would apply to voluntary declarations of trust.[4] But the true rule now seems to be that where the instrument is perfectly executed and intended to operate at once, no resulting trust for the grantor will arise from the mere fact that the transaction is a voluntary one, unless there are other circumstances which tend to show that the grantee was not intended to take beneficially.[5]

91. The second general division of implied trusts is that which embraces those known as Constructive Trusts. Construc-

[1] *Infra*, Part I., Chap. V.

[2] Hill on Trustees, 128.

[3] *Infra*, Part I., Chap. V.

[4] Hill on Trustees, 196.

[5] Souverbye *v.* Arden, 1 Johns. C. R. 240; Rathbun *v.* Rathbun, 6 Barb. 98; Philbrook *v.* Delano, 29 Maine, 410; Jackson *v.* Cleveland, 15 Mich. 103; Baldwin *v.* Campfield, 4 Halst.Ch. 891; Hogan *v.* Jaques, 4 C. E. Green, 126; Bank of United States *v.* Housman, 6 Paige, C. R. 526; Titcomb *v.* Morrill, 10 Allen, 15. See, however, Hogan *v.* Strayhorn, 65 N. Carolina, 279

tive trusts are those which arise purely by construction of equity, and are entirely independent of any actual or presumed intention of the parties. Nor have constructive trusts, as they are here considered, any element of fraud in them. Equity, indeed, as we shall see, makes use of the machinery of a trust for the purpose of affording redress in cases of fraud; as when a party has acquired the legal title to property by unfair means, he will be deemed to hold it in trust for the injured party who may call for a conveyance thereof. The party guilty of the fraud is said, in such cases, to be a trustee *ex maleficio*.[1] But, in such cases, the interference of courts of equity is called into play by fraud as a distinct head of jurisdiction; and the complainant's right to relief is based upon that ground, the defendant being treated as a trustee merely for the purpose of working out the equity of the complainant. Cases of this description, therefore, will be considered under the head of Fraud. At present we have to do with those trusts which are, in the truest and most technical sense, constructive—those, namely, which arise by pure implication of equity, and without regard to the intention of parties, or (necessarily) the frustration of fraud.

92. One of the most ordinary trusts of this kind is that which grows out of the rule of law which forbids a trustee, or any other person who occupies a fiduciary or quasi fiduciary position, from gaining any personal advantage, touching the thing or subject as to which such fiduciary position exists.[2] To use the language of a learned author, "wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated."[3] The instance usually given of this rule is the renewal of a lease by a trustee in his own name and with his own funds, which

[1] See Hoge *v.* Hoge, 1 Watts, 163; Church *v.* Ruland, 14 P. F. Sm. 443; Maul *v.* Rider, 1 Id. 384; Beegle *v.* Wentz, 5 Id. 374; Squire's Appeal, 20 Id. 266; Steinruck's Appeal, Id. 289.

[2] Hill on Trustees, 159.

[3] American note to Keech *v.* Sandford, 1 Lead. Cas. in Eq. 62 (4th Am. ed.); Staats *v.* Bergen, 2 C. E. Green, 297; Ashuelot Railroad Co. *v.* Elliot, 57 N. Hamp. 397.

renewal will, by the equitable doctrine now under consideration, enure to the benefit of the *cestui que trust;* and the leading authority upon the subject is the case of Keech *v.* Sandford, otherwise known as the Rumford Market Case.[1] In that case the trustee applied, in the first instance, for the renewal for the benefit of the beneficiary, who was an infant; but the renewal was refused on the ground that, the subject-matter of the lease being the profits of a market, there could be no distress, and the lessee's remedy must be on the covenant alone, by which the infant could not be bound. The trustee then renewed for himself; and it was held, on bill filed, that he must still be regarded as a trustee of the lease for the benefit of the infant. The general doctrine of this case is well established in the United States.[2]

It may be thought that the above example might fall more properly under the head of a resulting trust of the second class,[3] on the one hand, or under the head of constructive trusts by presumptive fraud on the other. But the instance of a trust just stated differs from a resulting trust of the second class, inasmuch as the renewal of the lease was not made with trust funds, but with the proper money of the trustee; and it differs from a trust by fraud (growing out of the relation of parties) in this that no fraudulent intent is even presumed to exist, but the renewal is forbidden simply on the ground of public policy alone.[4]

93. The rule under discussion applies not only to persons standing in a direct fiduciary relation towards others—such as trustees, executors, attorneys, and agents, but also to those who

[1] 1 Lead. Cas. in Eq. 44; Sel. Cas. in Ch. 61. See, also, Mill *v.* Hill, 3 H. L. Cas. 828.

[2] American note to Keech *v.* Sandford, (*supra*); Parkist *v.* Alexander, 1 Johns. Ch. 394; Holridge *v.* Gillespie, 2 Id. 30; Davoue *v.* Fanning, Id. 252; Green *v.* Winter, 1 Id. 25; Van Horn *v.* Fonda, 5 Id. 409; Evertson *v.* Tappen, Id. 514; Wilson *v.* Troup, 2 Cowen, 195; Butler *v.* Hicks, 11 Sm. & Marsh. 78; Mathews *v.* Dragaud, 3 Dess. 25; Irwin *v.* Harris, 6 Ired. Eq. 221; Clark *v.* Cantwell, 3 Head, 202; Heager's Ex'rs., 15 S. & R. 65; Galbraith *v.* Elder, 8 Watts, 81; Huson *v.* Wallace, 1 Rich. Eq. 2; King *v.* Cushman, 41 Ill. 31; Frank's Appeal, 9 P. F. Sm. 190.

[3] *Supra*, page 127. See Cooper *v.* Phibbs, L. R., 2 H. L. Cas. 149.

[4] Where no actual fraud exists, the remedy is in equity alone; Yeackel *v.* Litchfield, 13 Allen, 417.

occupy any position out of which a similar duty ought in equity and good morals to arise. Thus it will be enforced against partners,[1] tenants in common,[2] tenants for life,[3] tenants for years,[4] mortgagees,[5] a husband,[6] attorneys-at-law,[7] and vendees under articles,[8] in favor of copartners, co-tenants, tenants in remainder, landlords, mortgagors, a wife, clients, and vendors, respectively. And these instances must be considered only as illustrations of the principle, and not as an exhaustive catalogue of the parties to whom it will be confined. A purchaser from a trustee, executor, etc., will also be held to the same responsibility if he is either a purchaser without value, or a purchaser with notice of the trust. To be protected he must be a *bona fide* purchaser, without notice and for a valuable consideration.[9]

On the other hand, a vendor of real estate under articles, or a mortgagor, is held to a corresponding duty towards the vendee or mortgagee. Thus it has been held that if a lessee mortgages the leasehold, and afterwards obtains a renewal, the renewal shall enure for the benefit of the mortgagee.[10] Whether a person who, if he renew at all, is bound to renew for the benefit of another, can purchase the *reversion* for himself, seems to be a doubtful question.[11]

The renewal of leaseholds is only an example of the general principle stated above, viz., that no fiduciary can gain any personal advantage touching the subject of the trust.[12] The same doctrine is applied to prevent the purchase by persons in such positions of any claims, encumbrances, or outstanding titles. If, therefore, a tenant in common were to purchase an outstanding, adverse title, the acquisition would enure to the benefit of

[1] Anderson *v.* Lemon, 4 Seld. 236; Cushing *v.* Danforth, 76 Me. 114.

[2] Keller *v.* Auble, 8 P. F. Sm. 410; Duff *v.* Wilson, 22 P. F. Sm. 442; Edmund's Appeal, 18 Id. 24.

[3] Dickinson *v.* Codwise, 1 Sandf. Ch. 227.

[4] Matthews' Appeal, 104 Pa. St. 444.

[5] Hyndman *v.* Hyndman, 19 Verm. 9; Benham *v.* Rowe, 2 Cal. 387; McHan *v.* Ordway, 76 Alab. 347. See Woodlee *v.* Burch, 43 Mo. 231.

[6] Swisshelm's Appeal, 6 P. F. Sm. 475.

[7] Moore *v.* Brecken, 27 Ill. 23; Galbraith *v.* Elder, 8 Watts, 81.

[8] Morgan *v.* Boone, 4 Monroe, 291; Stephens *v.* Black, 27 P. F. Sm. 138.

[9] Hill on Trustees, 162, 163; Bridgman *v.* Green, 2 Ves. Sr. 627.

[10] Smith *v.* Chichester, 1 Con. & L. 486.

[11] Randall *v.* Russell, 3 Meriv. 190. Though see Britton *v.* Lewis, 8 Rich. Eq. 271; Eldridge *v.* Smith, 34 Verm. 484.

[12] Hill on Trustees, 539 (849, 4th Am. ed.).

his co-tenants.[1] In other words, he will be treated as a constructive trustee of the newly-acquired title for the benefit of the other owners. And an agent employed to purchase, who takes a conveyance in his own name, will be considered as holding the property in trust for his principal.[2]

But a vendee under articles who buys at sheriff's sale to save his title, is not a trustee for the vendor—the only right of the latter is to recover on the agreement.[3]

94. Akin to the doctrine which has just been noticed is that which forbids trustees or executors from purchasing at their own sales. It has been held in many cases that if trust property is sold by the trustee even at public sale, he cannot purchase. If he does so, he will still be considered, at the option of the *cestui que trust*, a trustee by equitable construction.[4]

This rule does not proceed on the ground of fraud, but because of public policy.[5] It is the same policy as that which forbids a sheriff, for instance, from purchasing at a sale under an execution.[6] No fraud may exist in point of fact; no fraud is presumed in law; but public propriety would be outraged if such acts were permitted, and hence their prohibition. When they *do* occur, the wrong inflicted is redressed through the medium of a constructive trust.[7]

This rule applies not only to those cases in which the trustee or agent for sale buys directly from the beneficiary (in which case, indeed, an element of fraud through undue influence is introduced by which the transaction is vitiated), but also to purchases at public auction, where all the world has a chance to buy, and it makes no difference whether the purchase has been

[1] Lloyd *v.* Lynch, 4 Casey, 419; Dickey's Appeal, 23 P. F. Sm. 247.

[2] Parkist *v.* Alexander, 1 Johns. Ch. 394; Wellford *v.* Chancellor, 5 Grattan, 39; Baker *v.* Whiting, 3 Sumn. 476.

[3] See Thompson *v.* Adams, 5 P. F. Sm. 484.

[4] See notes to Fox *v.* Maekreth, 1 Lead. Cas. Eq. 115, and Hill on Trustees, 248 (4th Am. ed.). and notes.

[5] See Yeackel *v.* Litchfield, 13 Allen, 419.

[6] See Lazarus *v.* Bryson, 3 Binney, 58.

[7] Hill on Trustees, 159 (248, 4th Amed., and notes); Michoud *v.* Girod, 4 How. 504; Davoue *v.* Fanning, 2 John. Ch. 252; Leisenring *v.* Black, 5 Watts, 303; Staats *v.* Bergen, 2 C. E. Green, 544; Miles *v.* Wheeler, 43 Ill. 123; Kruse *v.* Steffens, 47 Id. 112; Blauvelt *v.* Ackerman, 5 C. E. Green, 141; Grumley *v.* Webb, 44 Missouri, 444; Roberts *v.* Roberts, 65 N. C. 27; Carter *v.* Thompson, 41 Ala. 375; Harris *v.* Parker, Id. 604; Scott *v.* Umbarger, 41 Cal. 419. See, however Birdwell *v.* Cain, 1 Cold. 301.

advantageous or not; in either event the *cestui que trust* or principal, as the case may be, has the right to have it rescinded.[1] The purchase, however, may be affirmed at the option of the *cestui que trust*.[2]

It is a disputed point whether the rule applies to sales made adversely to the trust. Thus it has been ruled that if a trust estate is sold under an adverse judgment, it is entirely competent for the trustee to bid.[3] The weight of authority, however, is, perhaps, the other way.[4]

Trustees are very frequently allowed by order of court to bid at their own sales, but in so doing their conduct is watched with great jealousy.[5]

95. A constructive trust will also arise if a person obtains from a trustee the trust property without paying value for it, although without notice of the trust. In such a case he will be held to be a trustee by construction.[6]

A constructive trust may also arise under a contract. Where a contract has been entered into for the sale of an estate, equity, as it looks upon things agreed to be done as actually performed,[7] considers the vendor as a trustee of the legal title for the purchaser, and the purchaser as a trustee of the purchase-money for the vendor.[8] The method of enforcing these trusts is by a bill to compel the conveyance of the legal title, or in other words, a bill for specific performance; and the subject will be considered when that equitable remedy is treated of.[9]

[1] Campbell *v.* Walker, 5 Vesey, 680; 13 Id. 601; Davoue *v.* Fanning, 2 John. C. R. 253; Boerum *v.* Schenck, 41 New York, 182; Washington, A. & G. R. R. Co. *v.* Alexandria & W. R. R. Co., 19 Grat. 592; Campbell *v.* McLain, 1 P. F. Sm. 200; Ives *v.* Ashley, 97 Mass. 198. Even if the trustee buys, not for himself, but for a third party; North Baltimore Asstn. *v.* Caldwell, 25 Maryl. 420.

[2] Ives *v.* Ashley (*supra*); Yeackel *v.* Litchfield, 13 Allen, 419; Perry on Trusts, § 198; Hill on Trustees, 249 (4th Am. ed.).

[3] Fisk *v.* Sarber, 6 Watts & Serg. 18; Chorpenning's Appeal, 8 Casey, 315; Dyer *v.* Shurtliff, 112 Mass. 165; Hall *v.* Bliss, 118 Id. 554; Hill on Trustees, 160 (250, 4th Am. ed.). But it has been held that the rule in Fisk *v.* Sarber does not apply to a case in which the judicial sale has been brought about by the trustees; Parshall's Appeal, 15 P. F. Sm. 235.

[4] Hill on Trustees, *ubi supra*; Perry on Trusts, § 205.

[5] Cadwalader's Appeal, 14 P. F. Sm. 293; Dundas's Appeal, Id. 325; Tennant *v.* Trenchard, L. R., 4 Ch. 537-547.

[6] Hill on Trustees, 172.

[7] *Ante*, p. 63.

[8] Hill on Trustees, 171.

[9] *Infra*, Part III., Chap. I.

Constructive, like resulting trusts, do not fall within the statute of frauds. Such has been the uniform doctrine of the English Courts, and the same rule has been adopted in this country.[1] Any other interpretation, indeed, would be in contravention rather than in fulfilment of the provisions of the statute; for it has been well said that it is not easy to see how such a trust could be established except by parol evidence, and that if such evidence were not competent, a "statute made to prevent frauds would become a most potent instrument whereby to give them success."[2]

CHAPTER IV.

TRUSTS FOR MARRIED WOMEN.

96. Rights of Husband at common law in wife's property.
97. Statutory changes.
98. Creation of trusts for sole and separate use.
99. Trustee not necessary.
100. No particular words necessary.
101. Power of married woman over separate estate.
102. Liability of separate estate to her engagements; *Johnson* v. *Gallagher*.
103. Rules in the United States upon this subject.
104. Restraints on anticipation.
105. For whose benefit separate estates may be created; *Massey* v. *Parker*; *Tullett* v. *Armstrong*.
106. Rules in the United States on this subject.
107. General conclusions; Lewin's propositions.
108. Pin-money trusts.
109. Wife's equity to a settlement.
110. How enforced.
111. How waived.
112. To what property it attaches.
113. Against whom, and in whose favor.
114. Gifts from husband to wife; contracts.
115. Contracts for separation.

96. It is well known that at common law a husband acquired a life estate as tenant by the curtesy of England in his wife's inheritable estates in realty, provided there was issue of the

[1] Hill on Trustees, 59; Plumer *v.* Reed, 2 Wright, 46; Beegle *v.* Wentz, 5 P. F. Sm. 369; Seechrist's Appeal, 16 Id. 237; Church *v.* Ruland, 14 Id. 442; Hoge *v.* Hoge, 1 Watts, 163.

[2] Church *v.* Ruland (*supra*). See, also, Long *v.* Perdue, 2 Norris, 217; Haigh *v.* Kaye, L. R., 7 Ch. 469; Story's Eq. Jurisp., § 1198.

marriage born alive,[1] that he had power to alien her chattels real, and that he also became entitled to her personal property in possession, and to her *choses in action*, provided he reduced them into possession during coverture, or by administration if he survived her.

This was the case not only as to the property of a *feme covert* of which she held the legal title, but also as to that in which she had only an equitable interest. If, for example, a fund were held by a trustee for the benefit of a woman, and she were to marry, her husband would have had the right to demand payment to himself, and his receipt would have been a sufficient discharge.[2]

This right of the husband was, however, subject to this qualification, viz., that, if, in order to reach the equitable property of the wife, he were obliged to come into the court of chancery, equity would compel him, at her request, to make a suitable provision for herself and her children.[3] This right of the wife was what is known as her equity to a settlement. It grew out of the general maxim that he who seeks the aid of a court of equity must do equity; and was, therefore, at first supposed to be enforceable against the husband, only in those instances wherein he was compelled to resort to the assistance of a chancellor for the purpose of reaching his wife's property. It was, however, decided in Elibank *v.* Montolieu that the benefit of this rule could be claimed by the wife as plaintiff, and this is now the settled law.[4]

97. The English common-law rule existed originally in most of the United States. It has, however, in many, if not all of them, been altered by statute, and the property of married women has been freed from the grasp of the husband's authority, and from liability for his debts and engagements; and the common-law rights of the husband in his wife's property have recently been modified in England, in a like manner, by the Married Women's Property Act of 1882, by which the property of a married woman is absolutely secured to her, and the intervention of a trustee is unnecessary. The *power* of a married woman, more-

[1] In many States of the Union birth of issue is no longer a requisite to tenancy by the curtesy.

[2] Hill on Trustees, 407; Perry on Trusts, § 626.

[3] Elibank *v.* Montolieu, 1 Lead. Cas. Eq. 623, and *post*, sec. 109.

[4] Elibank *v.* Montolieu, 5 Vesey, 737.

over, in respect of her property, has undergone an equally radical change; for a *feme covert* may now, without the intervention of a trustee, dispose by will or otherwise, of any property, real or personal, as if she were a *feme sole*.[1]

98. Reasons similar to those which have led to these legislative enactments, had long ago in England induced the Court of Chancery to interpose its extraordinary jurisdiction for the protection of married women, and this object was effected by the creation of what is now so well known as the equitable separate estate of *femes coverts*—which not only owes its existence to equity, but which is governed, in many particulars, by rules differing from those which are incidental to ordinary legal and equitable estates, and which the courts have found necessary to lay down in order to attain the desired end.

This equitable separate estate may be defined to be an estate created by, and originally recognised only in, courts of equity, for the purpose of securing the beneficial enjoyment of property to a woman during coverture—this purpose being effected through the medium of a trust whereby the ordinary marital rights of the husband over his wife's property are excluded, so far as the same are in contravention of the *feme's* enjoyment of her estate.[2]

It will be seen, hereafter, that while the objects which the courts had in view, in creating the equitable separate estate, were to exclude the husband's control, to free the property from liability for his debts, and to secure to the wife its beneficial ownership, yet the decisions upon this subject have not been uniformly successful in accomplishing the desired results.

It may be observed here that while the separate use trust is of an exceptional character,[3] yet it is based upon very broad principles which occasionally manifest themselves in other equitable doctrines as much at variance with the ordinary common-law rules as the one now under consideration. Thus it has been pointed out by a learned judge that not unfrequently a strife

[1] 45 and 46 Vic. c. 75; see Davies *v.* Jenkins, 6 Ch. D. 728; Morrell *v.* Cowan, Id. 166. See notes to Hulme *v.* Tenant, 1 Lead. Cas. Eq. 481 (4th Eng. ed.).

[2] When the legal title is vested in the *feme* there is no separate estate. Todd's Appeal, 12 Harris, 429.

[3] When the settlement to the separate use of a married woman is made in pursuance of an ante-nuptial contract, no policy of the law is violated. It is simply the fulfilment of a contract. Lewin on Trusts, 120.

occurs between the will of the donor and the public policy which forbids a restraint upon alienation, or which renders property in which a party has a beneficial interest subject to the grasp of his creditors. Yet it has occurred in many instances that both of these branches of public policy have been, to a certain extent, infringed, because equity has thought it right to allow a donor to make a gift upon such terms, and subject to such restrictions, as he might see fit.[1]

99. It has been stated already that the object of securing to a wife the enjoyment of her estate, was effected through the medium of a trust. Wherever there is an intention to create a trust, and that intention is manifested by apt words, the use will not be executed in the wife.[2] It is not, however, necessary that a *trustee* should be expressly nominated. It was, indeed, at one time doubted whether a trustee would not be necessary,[3] but it is now settled that where there is a gift to a married woman, and no trustee is named, the husband will be considered as a trustee;[4] especially if the gift be from him directly to the wife, for in this last case the gift could be supported in no other way.[5] But while a *trustee* is not necessary, it *is* essential that there should be a trust; in other words, it is imperative that there should be a separation of the estate into its legal and

[1] See Wells *v.* McCall, 14 P. F. Sm. 212 (per Agnew, J.); Dodson *v.* Ball, 10 Id. 492.

[2] See Ware *v.* Richardson, 3 Maryl. 553, and Ayer *v.* Ayer, 16 Pick. 327, where the subject is well discussed.

[3] By Lord Cowper in Harvey *v.* Harvey, 1 P. Wms. 125.

[4] Bennet *v.* Davis, 2 P. Wms. 316; Parker *v.* Brooke, 9 Ves. 583; Jamison *v.* Brady, 6 S. & R. 466; Vance *v.* Nogle, 20 P. F. Sm. 179; Shonk *v.* Brown, 11 Id. 320; Varner's Appeal, 30 Id. 140; Barron *v.* Barron, 24 Vt. 375; Long *v.* White, 5 J. J. Marsh. 226; Trenton Banking Co. *v.* Woodruff, 1 Green, 117; Steele *v.* Steele, 1 Ired. Eq. 452; Freeman *v.* Freeman, 9 Missouri, 772; Hamilton *v.* Bishop, 8 Yerg. 33; Fears *v.* Brooks, 12 Georgia, 195; Whitten *v.* Jenkins, 34 Id. 297; Hill on Trustees, 628 (4th Am. ed.); Perry on Trusts, § 647.

[5] Steel *v.* Steel, 1 Ired. Eq. 452, 455; McKennan *v.* Phillips, 6 Wharton, 571; Boykin *v.* Ciples, 2 Hill Ch. 200; Baskins *v.* Giles, Rice's Eq. 316; Long *v.* White, 5 J. J. Marsh. 226; Trenton Banking Co. *v.* Woodruff, 1 Green Ch. 118; Freeman *v.* Freeman, 9 Missouri, 772; Hamilton *v.* Bishop, 8 Yerger, 33; Jamison *v.* Brady, 6 Serg. & R. 466; Heck *v.* Clippenger, 5 Barr, 385; Shirly *v.* Shirly, 9 Paige, 364. See, however, Wade *v.* Fisher, 9 Rich. Eq. 362, where the gift was not upheld. In Penna. Salt Co. *v.* Neel, 4 P. F. Sm. 17, such a conveyance was sustained in a common-law action.

equitable elements, and that the latter only should vest in the wife. If the legal estate becomes vested in the *feme*, it is impossible to exclude the rights of the husband.[1]

100. No particular form of words is necessary to create a trust for the benefit of a *feme covert.*

According to the modern English authorities, the most apt word to create such a trust is "separate;" which has a fixed and technical meaning, and which will of itself, exclude the marital rights; whereas the same fixed and technical meaning is not attributable to "sole."[2] And it may be stated in general that the instrument must manifest a design to exclude the husband, or must contain expressions inconsistent with his marital rights in respect of the property.[3]

Any form of expression, however, indicative of an intention to confer the beneficial enjoyment upon the wife, and to exclude the rights of the husband, will be enough.[4] It would be almost impossible to give all the expressions which have been held to be sufficient; the following are instances: "for her sole and separate use;"[5] "for her own use and benefit independent of any other person;"[6] her husband "to have no control;"[7] "for the use,

[1] Bush *v.* Allen, 5 Mod. 63; Harton *v.* Harton, 7 Term R. 652; Williams *v.* Waters, 14 Mees. & Wel. 166; Ware *v.* Richardson, 3 Maryl. 552; Todd's Appeal, 12 Harris, 429.

[2] See Gilbert *v.* Lewis, 1 De G., J. & Sm. 38; Lewis *v.* Mathews, L. R., 2 Eq. 177; Massy *v.* Bowen, L. R., 4 H. L. Cas. 288.

[3] Rudisell *v.* Watson, 2 Dev. Eq. 430; Ashcraft *v.* Little, 4 Ired. Eq. 236, 238; Williams *v.* Claiborne, 7 Sm. & Marsh. 488; Carroll *v.* Lee, 3 Gill & J. 505; Roane *v.* Rives, 15 Ark. 330; Nightengale *v.* Hidden, 7 R. Island, 115; Evans *v.* Knorr, 4 Rawle, 66; Evans *v.* Gillespie, 1 Swan. 128; Cook *v.* Kennerly, 12 Alab. 42; Hale *v.* Stone, 14 Alab. 803; Turton *v.* Turton, 6 Maryl. 375; Brandt *v.* Mickle, 28 Id. 436; Tritt *v.* Colwell, 7 Casey, 228.

[4] Stuart *v.* Kissam, 2 Barb. 494; West *v.* West, 3 Rand. 378; Lewis *v.* Adams, 6 Leigh, 320; Perry *v.* Boileau, 10 Serg. & R. 208; Ballard *v.* Taylor, 4 Dessaussure, 550; Davis *v.* Cain, 1 Ired. Eq. 305; Heathman *v.* Hall, 3 Id. 414; Hamilton *v.* Bishop, 8 Yerg. 33; Beaufort *v.* Collier, 6 Humph. 487; Somers *v.* Craig, 9 Id. 467; Nixon *v.* Rose, 12 Grat. 425: Williams *v.* Avery, 38 Alab. 115; Clark *v.* Maguire, 16 Miss. 302; Boal *v.* Morgner, 40 Id. 48.

[5] Parker *v.* Brooke, 9 Vesey, 583; Archer *v.* Rorke, 7 Ir. Eq. 478.

[6] Margetts *v.* Barringer, 7 Sim. 482; see, also, Pepper *v.* Lee, 53 Alab. 33.

[7] Edwards *v.* Jones, 14 Weekly Rep. 815; see Craig *v.* Watt, 8 Watts, 498.

maintenance and support;"[1] "solely for her own use;"[2] "for her sole use, benefit and behoof;"[3] "absolutely;"[4] "her receipt to be a sufficient discharge;"[5] "to be paid to her when she is divorced from her husband or voluntarily withdraws from him."[6]

On the other hand, the following have been considered as insufficient to raise a trust: "to her use;"[7] "to her own use;"[8] "to her heirs and assignees, for her or their own sole use;"[9] "for her use and benefit;"[10] "but the said gift extends to no other person."[11]

Whether a provision that the property "is not to be liable to her husband's debts," will be enough to create a separate trust, cannot perhaps be declared with certainty, as the authorities are not uniform.[12]

The fact that the estate is given to the feme *jointly* with others will not prevent it from being an estate to the sole and separate use.[13]

It is obviously impossible to lay down any authoritative rules by which all the decisions upon this subject can be reconciled. But the classification suggested in Nix *v.* Bradley[14] seems to be

[1] Good *v.* Harris, 2 Ired. Eq. 630. See, also, for the same or nearly identical expression; Newman *v.* James, 12 Alab. 29; Warren *v.* Haley, 1 Sm. & Marsh. Ch. 647; Heathman *v.* Hall, 3 Ired. Eq. 414; Griffith *v.* Griffith, 5 B. Mon. 113.

[2] Jamison *v.* Brady, 6 Serg. & Rawle, 466; Snyder *v.* Snyder, 10 Barr, 423; Jarvis *v.* Prentice, 19 Conn. 273; Goodrum *v.* Goodrum, 8 Ired. Eq. 313; Cuthbert *v.* Wolfe, 19 Alab. 373; Stuart *v.* Kissam, 2 Barb. 494.

[3] Williman *v.* Holmes, 4 Rich. (Eq.) 479.

[4] Shewell *v.* Dwarris, Johns. Ch. 172; Brown *v.* Johnson, 17 Alab. 232.

[5] Lee *v.* Prieaux, 3 Bro. Ch. 381; Stanton *v.* Hall, 2 R. & M. 180; Charles *v.* Coker, 2 S. Carolina. 122.

[6] Perry *v.* Boileau, 10 S. & R. 208.

[7] Jacobs *v.* Amyatt, 1 Mad. 376, n.; Torbert *v.* Twining, 1 Yeates, 432; Tenant *v.* Storey, 1 Rich. Eq. 222.

[8] Johnes *v.* Lockhart, 3 Bro. Ch. 383, n.

[9] Lewis *v.* Mathews, L. R. 2 Eq. 177; but see Williman *v.* Holmes, 4 Rich. Eq. 475; Rudisell *v.* Watson, 2 Dev. Eq. 430; Houston *v.* Embry, 1 Sneed, 480. See, also, Tylor *v.* Lake, 2 R. & M. 183.

[10] Fears *v.* Brooks, 12 Georgia, 198; Clevenstine's Appeal, 3 Harris, (Pa.) 499.

[11] Ashcraft *v.* Little, 4 Ired. Eq. 236.

[12] Gillespie *v.* Burleson, 28 Alab. 551; Lewis *v.* Elrod, 38 Id. 17; Martin *v.* Bell, 9 Rich. Eq. 42; Young *v.* Young, 3 Jones Eq. 216.

[13] Metropolitan Bank *v.* Taylor, 53 Mo. 444; Burnley *v.* Thomas, 63 Id 392.

[14] 6 Rich. Eq. 48.

highly satisfactory. It was there said that the expressions whereby a separate estate could be created might be grouped in three classes: 1st. Where the technical words "sole and separate use," or equivalent words, are used. 2d. Where the marital rights are expressly excluded. 3d. Where the wife is empowered to perform acts concerning the estate given to her, inconsistent with the disabilities of coverture.

It must be remembered, moreover, that the *intent* to create a separate estate must exist, and that words which might otherwise have been considered apt words to create a separate estate, will not have that effect if it appears from the instrument that a separate use was not *intended* to be created. Thus in Lippincott *v.* Mitchell[1] the words "sole and proper use, benefit and behoof" of the wife were relied upon as creating a separate estate. But these words occurred in the *habendum* of the deed, and were simply the ordinary conveyancing form of expression which occurs in that portion of the document. It was, therefore, held that no separate use was created.

101. It was said above, that the objects sought to be attained by the trusts now under consideration, were very nearly defeated by the construction which the English Court of Chancery placed upon the authority and powers of the *feme* over property so limited. This construction was that a *feme covert* was, as to her sole and separate estate, to be regarded as a *feme sole*, and that therefore she had the same power of disposition over the estate, and was subject to the same liabilities in regard to it, as if she were unmarried.

Her power of disposing of her estate was settled by many authorities.

"The first case upon the subject," said Lord Thurlow, in Fettiplace *v.* Gorges,[2] "is a very old one in Tothill; that when a woman from her separate stock has saved a sum of money, she may dispose of it. I know there is a vast number of cases upon it; but I have always thought it settled that from the moment a woman takes personal property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it." And this right may be exercised by a disposi-

[1] 4 Otto, 767. [2] 1 Ves., Jr., 48.

tion *inter vivos*;[1] or by will.[2] This power of disposition was formerly supposed to apply only to personalty, and to a life interest in realty; but it is now held in England that the *feme* is entitled to dispose of the *corpus* of her real estate;[3] and that, too, by will or by deed not acknowledged according to the formalities of the statute.[4] In other words, a gift of a fee-simple estate or a gift of a capital sum of money to the separate use of a married woman gives her the same power of alienation over it as if she were a single woman.[5] This was decided in the year 1865, in the leading case of Taylor *v.* Meads, just cited, and the rule upon the subject was there stated by the Chancellor (Lord Westbury) in the following language: "With respect to separate property, the *feme covert* is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris* the common law attaches a right of alienation, and accordingly the right of a *feme covert* to dispose of her separate estate was recognised and admitted from the beginning until Lord Thurlow devised the clause against anticipation. But it would be contrary to the whole principle of the doctrine of separate use to require the consent or concurrence of the husband in the act or instrument by which the wife's separate estate is to be dealt with or disposed of. That would be to make her subject to his control or interference. The whole matter lies between a married woman and her trustees; and the true theory of her alienation is that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the *feme covert's* equitable interest. When the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity."

102. The same line of reasoning, which induced the English

[1] Wagstaff *v.* Smith, 9 Vesey, 520.

[2] Rich *v.* Cockell, 9 Vesey, 369.

[3] Taylor *v.* Meads, 34 L. J. Ch. 203; 11 Jur. N. S. 166; 4 De G., J. & Sm. 597. See, also, Hall *v.* Waterhouse, 5 Giff. 64; Pride *v.* Bubb, L. R., 7 Ch. 64.

[4] Id.

[5] Per Sir George Jessel, M. R., in Cooper *v.* Macdonald, 7 Ch. D. 293.

courts of equity to recognise the *power* of a married woman to alienate her separate estate, has also led to a recognition of the liability of this estate to the engagements of the *feme*. The separate property of a married woman being a creature of equity, it follows, that, if she has the power to deal with it, she has the other power incident to property in general, viz., the power of contracting debts to be paid out of it; and equity will lay hold of the separate estate as the only means by which those debts can be satisfied.[1] This liability was at first supposed to exist only when the *feme* had executed some obligation under seal;[2] but the courts have now reached the conclusion that the same liability exists in respect of a mere verbal engagement; and that when a married woman enters into an agreement, she allows the supposition to be made that she intends to perform the agreement out of her property, and that she creates a debt which may be recovered, not by reaching her but by reaching her property.[3] When a man contracts debts, both his person and his property are by law liable to the payment of them. A court of equity, having created a separate estate, has enabled a married woman to contract debts in respect of it. Her person cannot be made liable, either in law or in equity,[4] but in equity her property may. A court of equity gives execution, therefore, against the property, just as a court of law gives execution against the property of other debtors. These are the views expressed by Lord Justice Turner, in Johnson *v.* Gallagher,[5] and must now be taken as the settled law of England upon the subject.[6] It must be

[1] Hulme *v.* Tenant, 1 Lead. Cas. Eq. 679 (481, 4th Eng. ed); Owens *v.* Dickinson, 1 Cr. & Ph. 48; Perkins *v.* Elliott, 8 C. E. Green, 529.

[2] Hulme *v.* Tenant, 1 Bro. C. C. 16.

[3] Picard *v.* Hine, L. R., 5 Chan. 274; Johnson *v* Gallagher, 3 De G., F. & J. 494; London Bank of Australia *v.* Lempriere, 4 Priv. Coun. App. 572; Murray *v.* Barlee, 3 M. & K. 209; Matthewman's Case, L. R., 3 Eq. 781; Shattock *v* Shattock, L. R., 2 Eq. 182.

[4] It had been decided in Corbett *v.* Poelnitz, 1 T. R. 5, that an action at common law would lie when the wife has a separate maintenance and lives apart from her husband, and receives credit upon the possession of the estate; but this was subsequently overruled in Marshall *v.* Rutton, 8 T. R. 545.

[5] 3 De G., F. & J. 509.

[6] See the opinions of the Lord Chancellor, Hatherley, and of Lord Justice Sir G. M. Giffard, in Picard *v.* Hine, L. R., 5 Chan. 274. See, also, London Bank of Australia *v.* Lempriere, L. R., 4 Priv. C. App. 572; Harvey's Estate, (Godfrey *v.* Horten, 13 Chan. Div. 216; Hodgson *v.* Williamson, 15 Ch. Div. 89. A contract of a married woman, where it binds her separate estate, binds only that of which she was possessed at the time of the contract. Pike *v.* Fitzgibbon, 17 Ch. D. 454. In Massachusetts, see Rogers *v.* Ward, 8 Allen, 389.

here observed that the courts have not yet gone to the length of holding that a mere general engagement of a married woman will in all cases affect her separate estate.[1] The true view seems to be that such an engagement will be binding if it appears that it was made with reference to, and upon the faith and credit of, her separate estate; but that whether it was so or not is a question to be judged of by the court under all the circumstances of the case. The fact that the *feme* is living separate from her husband, and is known not to be receiving maintenance from him, is considered evidence to show that the contract was made with reference to her separate estate.[2]

It was at one time supposed that the contract of a *feme covert* operated as an appointment of her separate estate;[3] but this idea is now exploded; as it is manifest that to hold such a doctrine would lead to the conclusion that the debts were to be paid in the order of their creation, whereas they all stand on an equal footing, and are paid *pari passu*.[4]

[1] "The principle, as I have always understood it," said Sir George Jessel, M. R., in Wainford *v.* Heyl, L. R., 20 Eq. 324, "is this: a married woman is liable—or rather her separate estate is liable (for there is no personal liability as far as she is concerned)—to make good all contracts which are made by her with express reference to her separate estate, or which from the nature of the contract itself must be intended to be so referred; but she is not liable even for general contracts which cannot be referred; *â fortiori* she is not liable for general torts, but her husband is liable. Her separate estate may be liable for a fraud relating to the separate estate, that is, dealing with the separate estate by way of fraudulent representation. Again, the estate may be made liable for an actual appropriation of funds subject to the same settlement, and the same trusts which create the separate estate. That I understand is the decision in Clive *v.* Carew, 1 J. & H. 199. But apart from such cases as these, one cannot conceive why she should be made liable for general torts in reference to trusts any more than for general torts at law."

[2] Picard *v.* Hine; Johnson *v.* Gallagher, *ut sup.*; Johnson *v.* Cummins, 1 C. E. Green, 97, and Harrison *v.* Stewart, 3 Id. 451. See Dodge *v.* Knowles, 114 U. S. 430.

[3] Clark *v.* Miller, 2 Atk. 379; Murray *v.* Barlee, 4 Sim. 82, by Sir L. Shadwell, V. C.

[4] Murray *v.* Barlee, 3 M. & K. 209, reversing the Vice Chancellor in 4 Sim. 82; Owens *v.* Dickinson, 1 Cr. & Ph. 48. The decision of Lord Eldon, in Nantes *v.* Corrock, 9 Ves. 189, that the stock of a *feme covert* was not bound by her engagements because it was not liable to execution, also shows that the liability is not by way of appointment, for if it were, the circumstance that stock was a species of property not liable to execution would be entirely immaterial.

103. In the United States the decisions upon the power of a *feme covert* over her separate estate, and its liability to her engagements, have not been uniform. The first departure from the English rule was in South Carolina, in the year 1811. In the case of Ewing *v.* Smith,[1] the Court of Appeals (overruling the decision of Chancellor Dessaussure) held that a *feme covert* had no powers over her separate estate except those which had been given to her by the trust instrument, and that the powers conferred must be strictly pursued. This decision, with the exception of a doubt expressed in 1826,[2] has been steadfastly adhered to in subsequent cases.[3] The same rule was established in Pennsylvania, in the leading case of Lancaster *v.* Dolan,[4] and was upheld and enforced in subsequent decisions.[5] It was, indeed, held in that State, in Haines *v.* Ellis,[6] that the law had been altered by the Married Woman's Act of 1848; but this decision was subsequently overruled.[7] In the authorities just cited it was said that there is a manifest difference between the *legal* separate estate, which is due to the provisions of the statute and the *equitable* separate estate which is the creature of Courts of Equity; and this view seems to be taken, also, by the courts in Illinois,[8] and, after some fluctuation, by those in Alabama.[9] But a different opinion on the subject has been entertained in other States, and the general tendency of the decisions is, perhaps, to put estates of both kinds, so far as regards the power of the *feme*

[1] 3 Dessaus. 417.

[2] Frazier's Trustees *v.* Center, 1 McCord, Ch. 270, 275.

[3] Magwood *v.* Johnson, 1 Hill Ch. 228; Robinson *v.* Dart's Ex'rs., Dudley's Eq. 128, 131; Reid *v.* Lamar, 1 Strobh. Eq. 27.

[4] 1 Rawle, 231.

[5] Rogers *v.* Smith, 4 Barr, 93; Thomas *v.* Folwell, 2 Wharton, 11; Wallace *v.* Coston, 9 Watts, 137; Cochran *v.* O'Hern, 4 W. & S. 95; Lyne's Ex'rs. *v.* Crouse, 1 Barr, 111; Rogers *v.* Smith, 4 Id. 93; Jones's Appeal, 7 P. F. Sm. 369; McMullen *v.* Beatty, 6 Id. 389; West *v.* West, 10 S. & R. 445. See Maurer's Appeal, 5 Norris, 380.

[6] 12 Harris, 253.

[7] Penna. Ins. Co. *v.* Foster, 11 Casey, 134; Wright *v.* Brown, 8 Wright, 224; Shonk *v.* Brown, 11 P. F. Sm. 320.

[8] Cookson *v.* Toole, 59 Ill. 515; Bressler *v.* Kent, 61 Id. 426; Cole *v.* Van Riper, 44 Id. 58; Carpenter *v.* Mitchell, 50 Id. 470; Rogers *v.* Higgins, 48 Id. 211.

[9] See Short *v.* Battle, 52 Alab. 456, overruling Molton *v.* Martin, 43 Id. 651; Glenn *v.* Glenn, 47 Id. 204, and Denechaud *v.* Berrey, 48 Id. 591. See Lippincott *v.* Mitchell, 4 Otto, 767.

over them, upon the same footing.[1] The South Carolina rule was, however, adopted in Rhode Island,[2] Tennessee,[3] Mississippi,[4] Illinois,[5] and, formerly, in Maryland.[6] It was also recognised, to a limited extent, in Ohio.[7]

On the other hand, the English rule has been followed in a number of the States. It was adopted in New York in Jaques *v.* The Methodist Church,[8] overruling Chancellor Kent, who had decided the other way;[9] although more recent decisions have somewhat modified the doctrine.[10] It has been followed in New Jersey,[11] Connecticut,[12] Kentucky,[13] Virginia,[14] North Carolina,[15] Alabama,[16] Georgia,[17] Missouri,[18] Minnesota,[19] Maryland[20] and California;[21] and also, in Vermont (to a certain extent),[22] and in Florida.[23] It has likewise been followed in the Federal courts.[24] The above States, too, have followed substantially the English rule upon the subject of the

[1] Yale *v.* Dederer, 18 N. Y. 265; Ballin *v.* Dillaye, 37 N. Y. 35; Peake *v.* La Baw, 6 C. E. Green, 282; Willard *v.* Eastham, 15 Gray, 328.

[2] Metcalf *v.* Cook, 2 R. I. 355.

[3] Marshall *v.* Stephens, 8 Hump. 159. See, however, Young *v.* Young, 7 Cold. 461.

[4] Doty *v.* Mitchell, 9 Sm. & M. 435.

[5] Swift *v.* Castle, 23 Ill. 209; Bressler *v.* Kent, 61 Ill. 426, overruling Young *v.* Graff, 28 Ill. 20.

[6] Miller *v.* Williamson, 5 Maryl. 219; Tarr *v.* Williams, 4 Maryl. Ch. 68; but see Cooke *v.* Husbands, 11 Maryl. 492. See, also, the American note to Hulme *v.* Tenant, 1 Lead. Cas. Eq. 741; Hill on Trustees (4th Am. ed.) 657: and Perry on Trusts, § 655.

[7] Machir *v.* Burroughs, 14 Ohio, N. S. 519.

[8] 17 Johns. R. 548 See, also, Dyett *v.* North Am. Coal Co., 20 Wend. 570; Powell *v.* Murray, 2 Edw. Ch. 636; Albany Ins. Co. *v.* Bay, 4 Conn. 9; Gardner *v.* Gardner, 7 Paige, 112; Cumming *v.* Williamson, 1 Sandf. 17; Curtir *v.* Engel, 2 Id. 287; Mallory *v.* Vanderheyden, 3 Barb. Ch. 10; 1 Comst. 453.

[9] 3 Johnson C. R. 78.

[10] See Yale *v.* Dederer, 18 N. Y. 265 22 N. Y. 456.

[11] Leaycraft *v.* Hedden, 3 Green Ch. 512; Perkins *v.* Elliott, 8 C. E. Green, 529.

[12] Imlay *v.* Huntington, 20 Conn. 175.

[13] Coleman *v.* Wooley, 10 B. Mon. 320; Burch *v.* Breckenridge, 16 Id. 482. This subject is now regulated by statute in this State.

[14] Vizzonneau *v.* Pegram, 2 Leigh, 183; Manzy *v.* Manzy, 79 Va. 537.

[15] Newlin *v.* Freeman, 4 Ired. Eq. 312.

[16] Bradford *v.* Greenway, 17 Alab. 805; Jenkins *v.* McConico, 26 Id. 213.

[17] Fears *v.* Brooks, 12 Geo. 200; Dallas *v.* Heard, 32 Id. 604.

[18] Kimm *v.* Weippert, 46 Mo. 532.

[19] Pond *v.* Carpenter, 12 Minn. 430.

[20] Buchanan *v.* Turner, 26 Maryl. 5

[21] Miller *v.* Newton, 23 Cal. 554.

[22] Frary *v.* Booth, 37 Verm. 78.

[23] Lewis *v.* Yale, 4 Florida, 418.

[24] Cheever *v.* Wilson, 9 Wall. 119.

liability of the estates of *femes covert* to their separate engagements.[1] And of late years the doctrine has been pushed in some States to great lengths. Thus it is now settled in Missouri that when a married woman gives a promissory note the law implies, *in the absence of proof to the contrary,* an intention to bind her separate estate; and although it is permissible to show that no such intention existed, yet such intention *not* to bind the separate estate must appear on the face of the instrument, otherwise the estate will be charged.[2]

On the other hand, it has been expressly decided in Virginia that the note, or other general engagement, of a married woman owning separate estate, creates no specific lien on such estate.[3]

Those States which were mentioned as having followed the lead of the South Carolina case of Ewing *v.* Smith, in regard to the power of a married woman to *convey* her separate estate, have also generally refused to adopt the English rule upon the subject of the *feme's* power to bind it by contract.[4] In South

[1] Gunter *v.* Williams, 40 Alab. 572; Armstrong *v.* Ross, 5 C. E. Green, 109; Van Kirk *v.* Skillman, 5 Vroom, 109; Batchelder *v.* Sargent, 47 N. Hamp. 265; Imlay *v.* Huntington, 20 Conn. 175; Cooke *v.* Husbands, 11 Maryl. 492; Penn *v.* Whitehead, 17 Grat. 503; Frazier *v.* Brownlow, 3 Ired. Eq. 237, (but not for general engagements, Knox *v.* Jordan, 5 Jones' Eq. 175); Bradford *v.* Greenway, 17 Alab. 797; Ozley *v.* Ikelheimer, 26 Alab. 332; Lillard *v.* Turner, 16 B. Mon. 374; Burch *v.* Breckenridge, Id. 482; Harris *v.* Harris, 7 Ired. Eq. 111; Whitesides *v.* Cannon, 23 Missouri, 457; Shafroth *v* Ambs, 46 Id. 114; Miller *v.* Brown, 47 Id. 504; Lewis *v.* Yale, 4 Flor. 418; Robert *v.* West, 15 Ga. 123; Dallas *v.* Heard, 32 Id. 604. In New York, see Yale *v.* Dederer (*supra*), Ballin *v.* Dillaye, 37 N. Y. 35; Corn Exchange Ins. Co. *v.* Babcock, 42 Id. 614; Maxon *v.* Scott, 55 N. Y. 247; Rohrbach *v.* Ins. Co., 62 N. Y. 47; M. B. & M. Co. *v.* Thompson, 58 N. Y. 80; Corbin *v.* Cantrell, 64 N. Y. 217. In Wisconsin, Todd *v.* Lee, 15 Wis. 365; 16 Id. 480. In Tennessee, see Hughes *v.* Peters, 1 Cold. 67. A good deal of discussion has taken place, of late years, as to how far the separate estate of married women under the statutes in the different States is chargeable with her engagements. The authorities upon the subject will be found collected and examined in the American note to Hulme *v.* Tenant, 1 Lead. Cas. Eq. 756, *et seq.* (4th Am. ed.). See, also, Deering *v.* Boyle, 8 Kans. 525; Wicks *v.* Mitchell, 9 Id. 80; Whitely *v.* Stewart, 63 Mo. 363; Cookson *v.* Toole, 59 Ill. 515; Halley *v.* Ball, 66 Id. 250; Haight *v.* McVeagh, 69 Id. 624; Husband *v.* Epling, 81 Id. 172.

[2] Kimm *v.* Weippert, 46 Mo. 532; Metropolitan Bank *v.* Taylor, 62 Id. 340; Burnley *v.* Thomas, 63 Id. 390. See, also, Gage *v.* Gates, 62 Mo. 412, as to the means of enforcing the charge.

[3] French *v.* Waterman, 79 Va. 617.

[4] Lancaster *v.* Dolan, 1 Rawle, 231; Metcalf *v.* Cook, 2 R. Island, 355; Litton *v.* Baldwin, 8 Hump. 209: Bailey *v.* Pearson, 9 Foster, 77; Perry on Trusts, § 661.

Carolina, Ohio, and Massachusetts, however, the separate estate is chargeable for debts contracted on its account and for its use, but not for the general engagements of the *feme.*[1]

104. The English rule above stated, in reference to the powers of a *feme covert* over her separate estate, and the liability of that estate to her engagements, naturally led to some plan by which the operation of the rule could be avoided, and the will of the donor carried out by giving the married woman the property in such a way that it would be protected against herself (so to speak) and her creditors, as well as against her husband and his indebtedness. The plan adopted was the insertion, in the trust instrument, of the clause against anticipation which was first invented by Lord Thurlow, and used in drawing Miss Watson's settlement.[2] This clause, viz., "not by way of anticipation," was held to be effective in imposing a restraint upon alienation,[3] and became the usual language in settlements. No particular form of words is, however, necessary. It is enough if the intention to impose the restraint be clearly expressed,[4] and the restraint may be implied when a different interpretation would defeat the purpose of the donor.[5] Thus, where it appeared that the paramount object of the will was to provide a fund for the support and maintenance of the testator's wife during her lifetime, and for the maintenance and education of his children, it was held that the power of alienation was impliedly but effectually forbidden;[6] and in Nix *v.* Bradley it was held that the same conclusion was to be drawn from the general languago and scope of the will.[7]

It will be observed that this restraint upon alienation is a violation of the ordinary rules of property, the general principle being that the power of alienation is a necessary and inseparable incident of ownership which cannot be taken away by any

[1] Magwood *v.* Johnston; 1 Hill, Eq. 228; Cater *v.* Eveleigh, 4 Dessaus. 19; James *v.* Mayrant, Id. 591; Adams *v.* Mackey, 6 Rich. Eq. 75; Machir *v.* Burroughs, 14 Ohio N. S. 519; Willard *v.* Eastham, 15 Gray, 328; Rogers *v.* Ward, 8 Allen, 388; Tracy *v.* Keith, 11 Allen, 214. See Heburn *v.* Warner, 112 Mass. 271.

[2] Lewin, p. 123.

[3] Parkes *v.* White, 11 Ves. 221.

[4] Notes to Hulme *v.* Tenant, 1 Lead. Cas. Eq. 520.

[5] Weeks *v.* Sego, 9 Georgia, 201; Nixon *v.* Rose, 12 Grat. 425; Perkins *v.* Hays, 3 Gray, 405; Nix *v.* Bradley, 6 Rich. Eq. 43.

[6] Perkins *v.* Hays, 3 Gray, 406.

[7] 6 Rich. Eq. 43.

condition or stipulation in the grant. But it being once settled that a wife might enjoy a separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found, as part of such laws, that the power of alienation belonged to the wife, and was destructive of the security intended for her estate. Equity again interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation.[1]

105. An important question which naturally presents itself in regard to these trusts is, "For whose benefit can they be created?" For it is obvious that the trust may be attempted to be created for the benefit either of a woman *covert* at the time, or in contemplation (more or less immediate) of coverture, or without any such contemplation; and the question arises, Is there any distinction between these cases? In other words, can a sole and separate use be limited to a *feme sole* which will come into operation whenever coverture takes place; or can the trust be called into being merely for the benefit of a woman actually married at the time of its creation?

In England, this question was considered in the year 1834, in the case of Massey *v.* Parker.[2] It was there decided that where a trust of this description was created for the benefit of a *feme sole*, it would, upon her marriage, be ineffectual to debar her husband from his marital rights. This decision, which was made by Lord Cottenham when Master of the Rolls, was, however, afterwards overruled by the same judge, as chancellor, in the subsequent case of Tullett *v.* Armstrong,[3] where the rule was laid down that a valid separate trust could be created for the benefit of a woman, unmarried at the time, which would come into active operation whenever a marriage took place; and which, moreover, would not cease entirely upon discoverture, but would revive and again take effect upon a subsequent marriage. This rule has been adhered to in England, and is now firmly established by many decisions.

But it must here be remarked that while a trust for the sole and separate use of a *feme* may be created when she is *sole*, yet, if she chooses to make any disposition of the property before

[1] By Lord Cottenham, in Tullett *v.* Armstrong, 4 My. & Cr. 405. See also Nickell *v.* Miller, 10 Grat. 336.

[2] 2 M. & K. 174.

[3] 4 M. & Cr. 377.

coverture, she is at liberty to do so; and that no restraint upon her power of alienation will be tolerated, if she elects to exercise that power before she becomes *covert*. In other words, a *feme* when *discovert* has the same power over an estate limited to her sole and separate use, as any other person *sui juris;* she has the option of determining the trust when unmarried; if she does not choose so to determine it, it will attach upon the first or any subsequent coverture.[1]

106. The decision in Massey *v.* Parker has been followed in Pennsylvania,[2] in Arkansas,[3] and in North Carolina.[4] In the first-named State it must now be considered the settled law that a separate use trust cannot be created except for a married woman, or one in immediate contemplation of marriage,[5] and that it ceases on *discoverture*, and does not revive on a second marriage.[6] Whether "immediate contemplation of marriage" may or may not exist in any particular case, must, it is evident, be a question of fact not always easy to determine. It was said, in a comparatively recent case, that the creation of the trust constitutes the evidence of the fact being in the contemplation of the donor or devisor, and when this is followed within a reasonable time by consummation of the marriage, it concludes the proof.[7]

But in other States of the Union the present English rule has been adopted.[8]

107. The restraint upon alienation, of course, will not prevent the *feme* from disposing of the property settled to her separate use, if she chooses to do so before marriage, or in the interval between different covertures; but the restraint will attach whenever coverture takes place. This is the English rule. But in those States where the separate use can only be created for the benefit of women who are either actually married, or in imme-

[1] See in this connection the case of Wright *v.* Wright, 2 Johns. & H. 647.

[2] Hamersley *v.* Smith, 4 Wharton, 126; Smith *v.* Starr, 3 Id. 62.

[3] Lindsay *v.* Harrison, 3 Eng. 311.

[4] Apple *v.* Allen, 3 Jones' Eq. 120; though see Bridges *v.* Wilkins, Id. 342.

[5] McBride *v.* Smyth, 4 P. F. Sm. 245; Snyder's Appeal, 92 Pa. St. 504; Neal's Appeal, 104 Pa. St. 214.

[6] Hamersley *v.* Smith, 4 Whart. 126; Bush's Appeal, 9 Casey, 85; McKee *v.* McKinley, Id. 92; Freyvogle *v.* Hughes, 6 P. F. Sm. 228.

[7] Wells *v.* McCall, 14 P. F. Sm. 207; Springer *v* Arundel, Id. 218; Ogden's Appeal, 20 Id. 501.

[8] Beaufort *v.* Collier, 6 Hump. 487; Shirley *v.* Shirley, 9 Paige, 363; Fellows *v.* Tann, 9 Alab. 1003; Fears *v.* Brooks, 12 Geo. 197; Waters *v.* Tazewell, 9 Maryl. 291; Staggers *v.* Matthews, 13 Rich. Eq. 154.

diate contemplation of matrimony, the clause in regard to anticipation is subject to the same rules, and it will be ineffectual except in the two specified cases.

The law upon this subject may, perhaps, be summed up in the questions propounded by Lewin, and in the answers thereto—as follows:—

1. Can property given to the separate use of a woman be disposed of by her before her marriage? This must be answered in the affirmative.

2. If the property is not so disposed of, does the separate use clause come into effective operation upon first and subsequent covertures? This must also be answered in the affirmative.

3. Is the clause against anticipation valid? It is.

It may be added that under the most recent English authorities, the trust for the sole and separate use extends to the absolute interest in personalty, and to the *corpus*, as well as to the income of real estate.[1]

If a married woman dies without having disposed of her separate estate by will, her husband, except when controlled by statute, will take the same interest therein as he does in her legal or ordinary equitable estates.[2]

108. Akin to trusts for the separate use of married women, are what are known as "pin money" trusts.

Pin money may be defined to be a yearly allowance settled by the husband upon the wife, for her clothes or other separate personal expenses; and its principal incident is that its purpose is expenditure, and not accumulation. Hence, if a married woman suffers this allowance to remain unpaid for several years, she will be unable to recover more than one year's arrears from her husband or his estate; for the reason that, as this allowance is designed to be appropriated for her personal expenses, it must be presumed that if she has not drawn upon this fund, she has been supplied by her husband from other sources, and that it would therefore be unjust, after he has once supplied her wants, from time to time, to hold him responsible for the accumulation

[1] Taylor *v.* Meads, 4 DeG., Jo. & Sm. 597.

[2] Stewart *v* Stewart, 7 Johns. Ch. 229; Fairies's Appeal, 11 Harris, 29; Donnington *v* Mitchell, 1 Green, (Ch.) 239; Cooney *v* Woodburn, 33 Md. 320; Perry on Trusts, § 668; *ante*, p. 90.

of her allowance, and thus, in effect, compel him to pay it twice. When, however, the wife's allowance has, in point of fact, been paid short, she may recover the accumulations.[1] On the other hand, where it appears that the husband has actually paid for his wife's expenses, she cannot even recover the one year's arrears. Nor can the wife's executors recover from the husband or his estate even one year's arrears; because the allowance is entirely personal with the wife, and the reason for its payment ceases with her death.

The leading case upon the subject is Howard *v.* Digby,[2] where the principles applicable to this species of trust will be found discussed.

109. It has been already mentioned, that the right of the husband to his wife's property is subject to this qualification, viz., that, if for the purpose of reaching her equitable property he is obliged to go into chancery, equity will compel him at her request to make a suitable provision for herself and her children.

110. It had been at first supposed that this right of the wife was of a passive rather than an active nature, and while capable of being enforced in a suit in which the husband was complainant, and which had been instituted by him for the purpose of getting in his wife's equitable *choses in action*, could not be actively asserted by the wife herself as plaintiff. This idea, however, was dissipated by the leading case of Elibank *v.* Montolieu,[3] and it was there held that the wife could come into chancery as complainant for the purpose of having a settlement made.

The better opinion is that the same rule exists in the United States.[4]

Where, however, the property out of which a settlement is

[1] Ridout *v.* Lewis, 1 Atk. 269.

[2] 8 Bligh, N. R. 224. As to the wife's *paraphernalia* and what jewels and other articles are included in the term, see Graham *v.* Londonderry, 3 Atk. 393, and note to Hulme *v.* Tenant, 1 Lead. Cas. Eq. 538, *et seq.*

[3] 5 Vesey, 757.

[4] Hill on Trustees, 632 (4th Am. ed.); Perry on Trusts, § 629; Kenny *v.* Udall, 5 Johns. Ch. 464; 3 Cowen, 590; Dearin *v.* Fitzpatrick, Meigs, 551; Poindexter *v.* Jeffries, 15 Grat. 363; and the dicta in many cases cited in the American note to Murray *v.* Lord Elibank, 1 Lead. Cas. Eq. 670. See, however, Jackson *v.* Hill, 25 Ark. 223.

sought is real estate, the wife, it is said, cannot come in as plaintiff.[1]

In the United States, also, settlements have, in some cases, been compelled, when actions have been brought to recover the wife's property in the common-law courts.[2]

This equity is believed to exist in all of the United States except New Hampshire and North Carolina, and it has also been recognised in the federal courts.[3] In those States where the property of a married woman is secured to them by statute, the reasons for the existence of this right have passed away, and as such statutes exist in nearly all of the States of the Union, the subject is not of such practical importance as formerly;[4] and in England also the Married Woman's Property Act of 1882[5] has greatly diminished the necessity for the application of this doctrine. It is still, however, proper to say a few words concerning the wife's "equity to a settlement" (as it is termed), and to notice how it may be enforced, out of what property, against whom, and for whose benefit.

When property of a married woman is vested in trustees, they may with perfect safety hand over the same to her husband, and take his receipt therefor, except, of course, in the case of property settled to her separate use;[6] or where the common-law rule has been altered by statute. But the trustees may, if they

[1] Gleaves *v.* Paine, 1 De G., J. & Sm. 87.

[2] Rees *v.* Waters, 9 Watts, 94; Perry on Trusts, § 629.

[3] Ward *v.* Amory, 1 Curtis, 432; Tucker *v.* Andrews 13 Maine, 124; Short *v.* Moore, 10 Verm. 446; Howard *v.* Moffatt, 2 John. Ch. 206; Wiles *v.* Wiles, 3 Maryl. 1; Poindexter *v.* Jeffries, 15 Grat. 363; Durr *v.* Bowyer, 2 McCord's Ch. 368; Andrews *v.* Jones, 10 Alab. 401; Davis *v.* Newton, 6 Met. 537; Chase *v.* Palmer, 25 Maine, 342; Wilks *v.* Fitzpatrick, 1 Humph. 54; Coppedge *v.* Threadgill, 3 Sneed, 577; Gould *v.* Gould, 16 Alab. 132; James *v.* Gibbs, P. & H. 277; Lay *v.* Brown, 13 B. Mon. 295; Barron *v.* Barron, 24 Verm. 375: Page *v.* Estes, 15 Pick. 369; Gardner *v* Hooper, 3 Gray, 398. In North Carolina, see Bryan *v.* Bryan, 1 Dev. Eq. 47; Lassiter *v.* Dawson, 2 Id. 383. In Pennsylvania, it is enforced by preventing a recovery in a legal action, unless upon the terms of making a suitable provision for the wife; Rees *v.* Waters, 9 Watts, 94. In New Hampshire it has not been recognised; Parsons *v.* Parsons, 9 N. Hamp. 309; Hill on Trustees, 631 (4th Am. ed.); Notes to Murray *v.* Lord Elibank, 1 Lead Cas. Eq. 670.

[4] See Perry on Trusts, § 645, note 9.

[5] 45 and 46 Vic., c. 75 (*supra*, pp. 139, 140).

[6] Perry on Trusts, § 627.

choose, refuse to make payment to the husband; who is then obliged, in order to get in the fund, to come into court and to submit to his wife's right to a settlement. In such a case the trustees will not be liable to costs. The wife's equity to a settlement will also be recognised by the courts, in bills filed by the creditors of the husband to reach the wife's choses in action.[1]

If the husband has become the purchaser, as it were, of his wife's property by settlement before marriage, he will not be compelled to make any allowance for her out of her equitable funds. In such a case he is considered to have acquired a right to the whole of his wife's fortune, not only by virtue of his marital right, but by purchase for value.[2] This rule, however, does not apply to property which the *feme* acquires subsequent to the coverture, and which is not included in the contemplated settlement. Out of this property she is entitled to her equity to a settlement.[3] Nor will the *feme* be deprived of this equity by a voluntary settlement *after* marriage.[4]

The wife cannot claim a settlement, if she has an adequate provision already.[5]

If a woman at the time of her marriage owes more than the amount of her property, she will not be entitled to a settlement;[6] but if the property exceeds the amount of her debts, she may be entitled to a settlement after provision has been made for the payment of her debts.[7]

A married woman may preclude herself from claiming her equity to a settlement by fraud,[8] or by improper conduct, such as adultery.[9]

111. The wife may waive her right to a settlement, unless her children have already acquired an interest therein. This

[1] Smith *v.* Kane, 2 Paige, 303; 1 Lead. Cas. Eq. 496.

[2] Perry on Trusts, § 635; Erskine's Trusts, 1 K. & J. 302.

[3] Garforth *v.* Bradley, 2 Ves. 677. See Matter of Beresford, 1 Dessaus. 263.

[4] Hill on Trustees, 409; though see Dunkley *v.* Dunkley, 2 De G., M. & G. 390; and Matter of Beresford, 1 Dessaus. 263.

[5] Notes to Murray *v.* Lord Elibank, 1 Lead. Cas. Eq. 670.

[6] Bonner *v* Bonner, 17 Beav. 86.

[7] Barnard *v.* Ford, L. R., 4 Ch. 247.

[8] Lush's Trusts, L. R., 4 Ch. 591.

[9] Carr *v.* Eastabrooke, 4 Ves. 146; In re Lewin's Trust, 20 Beav. 378.

waiver takes place on a separate examination of the wife, by which it is ascertained that her consent is given of her own free will, and is not obtained from her by fraud or force.[1] This consent cannot be taken if the wife is an infant.[2]

112. It is well settled that the equity to a settlement will attach to real estate, and to chattels real as well as to personal property; and it will attach to any property which becomes the subject of an equitable suit, even though it is legal in its nature.[3]

The equity to a settlement exists in respect of the wife's life interest as against an insolvent or bankrupt husband, or as against his general assignee in bankruptcy or insolvency.[4] But not as against her husband who supports her; or as against his particular assignee for value,[5] even if he does not support her. The assignment of the wife's life interest will be good only during coverture, and will not bind her if she survives.

The court will not order a settlement of reversionary personal property of the wife.[6]

The court will not ordinarily settle the whole fund upon the wife. A half is considered a fair settlement.[7] The *whole* may, however, be settled under special circumstances.[8]

113. This equity is enforceable as against the husband and all persons claiming under him, whether they are assignees for value,[9] or voluntary assignees, or assignees in bankruptcy.[10] And this equity is paramount to the right of set-off which an executor or administrator, from whom a legacy or distributive share was due to the wife, has by reason of any indebtedness of the

[1] Beaumont *v.* Carter, 32 Beav. 586; 1 Lead. Cas. Eq. 468 (4th Eng. ed.). Examinations of a similar character are prescribed by statute in many States where a conveyance of the real estate of a *feme covert* is made.

[2] Stubbs *v.* Sargon, 2 Beav. 496; Abraham *v.* Newcombe, 12 Sim. 566. See, however, Jennings *v.* Jennings, 2 Heisk. 283.

[3] Perry on Trusts, § 633.

[4] Sturgis *v.* Champneys, 5 My. & Cr. 97; Vaughan *v.* Buck, 1 Sim. N. R. 284; Ruffles *v.* Alston, L. R., 19 Eq. 539. See Beeman *v.* Cowser, 22 Ark. 429; Perry on Trusts, § 634.

[5] Tidd *v.* Lister, 10 Hare, 140; 3 De G., M. & G. 857. See Sims *v.* Spalding, 2 Duvall, 121.

[6] Osborn *v.* Morgan, 9 Hare, 432.

[7] 1 Lead. Cas. Eq. 464 (4th Eng. ed.).

[8] Perry on Trusts, § 636; Taunton *v.* Morris, L. R., 8 Ch. D. 453.

[9] Macaulay *v.* Philips, 4 Ves. 19; Haviland *v.* Bloom, 6 Johns. Ch. 180.

[10] Taunton *v.* Morris, L. R., 8 Ch. D. 453.

husband to the estate.[1] This, however, must be subject to the qualification noticed above, that where the interest, out of which the settlement is sought, is a life estate, it cannot be enforced as against the husband if he supports the wife, or against his particular assignee for value. The reason of this exception is that the assignment of the life estate will be good only during coverture.[2]

The equity to a settlement is the privilege of the wife, and can be enforced only by her, and may be waived by her after a separate examination. Nevertheless, when made it will enure to the benefit of the children. The children, however, cannot assert the right themselves; and if the wife dies before decree, the husband will take.[3]

When a person has committed a contempt by marrying a ward of the court, the court will order a settlement of her property to be made; and under such circumstances the settlement will be made to embrace her property of all kinds, legal as well as equitable, and will generally be of the whole estate.[4] So, when the husband has misbehaved, or has become utterly insolvent, settlements of purely legal property have been enforced. So also it is a settled doctrine that equity will lay its hands on the property of the wife which is within its power, for the purpose of providing a maintenance for her when she is abandoned by her husband, or prevented from cohabitation by his ill treatment.[5] These cases proceed upon somewhat different doctrines, however, from the pure equity to a settlement already considered.[6]

[1] 1 Lead. Cas. Eq. 447; Perry on Trusts, § 632.

[2] As to the parties against whom the wife's equity to a settlement will be enforced see Udall *v.* Kenney, 5 Johns. Ch. 464; Udall *v.* Kenney, 3 Cowan 591; Hanland *v.* Myers, 6 Johns. Ch. 25; Page *v.* Estes, 19 Pick. 269; Phillips *v.* Hassell. 10 Hump. 197; Coppedge *v.* Threadgill, 3 Sneed, 577; Moore *v.* Moore, 14 B. Mon. 259; Durr *v.* Bowyer, 2 McCord. Ch. 368; Duvall *v.* The Farmers' Bank, 4 G. & J. 283; Bennett *v.* Dillingham, 2 Dana, 436

[3] Perry on Trusts, § 627; 1 Lead. Cas. Eq. 460.

[4] 1 Lead. Cas. Eq. 496; Perry on Trusts, § 631.

[5] Nicholls *v.* Danvers, 2 Vern. 671; Williams *v.* Callow, Id. 752; Newsome *v.* Boyer, 3 P. Wms. 37; Cecil *v.* Juxon, 1 Atk. 278; Dumond *v.* Magee, 4 Johns. C. R. 322.

[6] Perry on Trusts, § 631. In some cases in the United States maintenance in the nature of alimony has been decreed by courts of equity. Purcell *v.* Purcell, 4 Hen. & Munf. 507; Pater-

In some States of the Union maintenance in the nature of alimony out of the *husband's* estate has been decreed to the wife under proceedings in equity. It is true that the general rule in England is *against* exercising such a jurisdiction,[1] and many of the American decisions are to the same effect.[2] But, on the other hand, there are not wanting authorities to the effect that such a jurisdiction will be assumed, and it seems to be conceded, on all sides, that courts of equity will lay hold of any ground of jurisdiction which the particular case may present for the purpose of affording the desired relief.[3] The subject was elaborately considered in Mississippi in Garland *v.* Garland,[4] and the jurisdiction supported. A different conclusion was, however, reached in Illinois.[5]

In some states the power is granted by statute.[6]

114. In considering the equitable doctrines which are applicable to the property of married women, the subject of gifts from the husband to the wife requires to be noticed.

The existence of a married woman being supposed to be merged in that of her husband, a conveyance from the latter to the former at common law is of no effect.

Deeds which operate at common law, and not under the statute of uses, pass no title to the wife.

In equity, however, the rule is otherwise. Gifts from the husband to the wife will be upheld, and if the legal title does not pass out of the former, he will, nevertheless, be considered to be a trustee for his wife, and the transaction will be upheld as a settlement.[7] And the same result will follow when the

son *v.* Paterson, 1 Hal. Ch. 389. In some States, jurisdiction in divorce is made a head of equitable relief. See statutes cited, *ante*, p. 23, *et seq.*

[1] See Ball *v.* Montgomery, 2 Ves. 196; Story's Eq. Jurisp., § 1422. See, also, article in 24 Am. Law Reg. 1.

[2] Fischli *v.* Fischli, 1 Blackf. 360; Peltier *v.* Peltier, Harrington's Ch. R. 19; Rees *v.* Waters, 9 Watts, 90; Pomeroy *v.* Wells, 8 Paige, 406; Parsons *v.* Parsons, 9 N. H. 309; McGee *v.* McGee, 10 Ga. 477; Doyle *v.* Doyle, 26 Mo. 546; Yule *v.* Yule, 2 Stockt. 138; Trotter *v.* Trotter, 77 Ill. 510.

[3] See Purcell *v.* Purcell, 4 Hen. & Munf. 507; Galland *v.* Galland, 38 Cal. 265; Butler *v.* Butler, 4 Littell, 202; Almond *v.* Almond, 4 Rand. 662; Logan *v.* Logan, 2 B. Mon. 142; Prather *v.* Prather, 4 Dessaus. 33; Rhame *v.* Rhame, 1 McCord, Ch. 197; Glover *v.* Glover, 16 Alab. 446; Graves *v.* Graves, 36 Iowa, 310.

[4] 50 Miss. 694.

[5] Trotter *v.* Trotter, 77 Ill. 510.

[6] See Michigan Stats. 1885, p. 169.

[7] McKennon *v.* Phillips, 6 Whart. 571; Williams's Appeal, 11 Wright, 307. See, also, Lowe *v.* McLeod, 76 Alab. 418.

gift emanates from a third person, the husband assenting to it and treating the property as belonging exclusively to the wife.[1] Equity, however, while upholding the gift, has thought it right to attach to it this qualification, viz., that the settlement must be a reasonable one. Equity will not assist the husband to impoverish himself for the sake of his wife.[2] To do so would be to injure his credit, and to act unfairly towards those who might afterwards become his creditors. The settlement, therefore, must not be actually fraudulent; that is, it must not be made while he is in embarrassed circumstances, or about to engage in a hazardous business, or in any way be calculated to deceive and injure *bona fide* creditors; and it must be a reasonable proportion of his estate. What that proportion is, does not appear to be definitely settled.[3]

Contracts between husband and wife will sometimes be enforced in equity.[4] And although, at common law, contracts between a man and woman would be extinguished by subsequent intermarriage, yet in equity the parties will be compelled to execute them. Of such agreements illustrations may be found in those cases in which ante-nuptial contracts are made without the intervention of trustees.[5]

115. Before leaving the subject of trusts for married women, it will be proper to say a few words upon a kindred topic, namely, contracts for separation between husband and wife.

It has been decided by the highest authority and in many cases, that agreements for *future* separation are invalid, and such must be considered as the settled law both in England and in the United States.[6]

[1] Gentry *v.* McReynolds, 12 Mo. 533; Welch *v.* Welch, 63 Id. 60.

[2] Stickney *v.* Borman, 2 Barr, 67.

[3] Sims *v.* Rickets, 35 Ind. 181; Benedict v. Montgomery, 7 Watts & Serg. 238; Coates *v.* Gerlach, 8 Wright, (Pa.) 43.

[4] Tennison *v.* Tennison, 46 Mo. 77; Bradish *v.* Gibbs, 3 Johns. Ch. 523; Livingston *v.* Livingston, 2 Id. 537; More *v.* Freeman, Bunb. R. 205; Lehr *v.* Beaver, 8 W. & S. 102; Fisher *v.* Filbert, 6 Barr, 61.

[5] See Neves *v.* Scott, 9 Howard, 196; Imlay *v.* Huntington, 20 Conn. 146; West *v.* Howard, Id. 581; De Barante *v.* Gott, 6 Barb. 492; Healy *v.* Rowan, 5 Grat. 414; Story's Eq. § 1370.

[6] Westmeath *v.* Westmeath, 1 Dow. & C. 519. Note to Stapilton *v.* Stapilton, 2 Lead. Cas. Eq. 855 (4th Eng.

But agreements for *immediate* separation, although formerly discountenanced as against the policy of the law, are now sustained in England, and are looked upon with more favor in this country. In Wilson *v.* Wilson,[1] it was decided by the House of Lords that the court of chancery might compel parties to articles for an agreement of separation, to execute a deed in pursuance thereof. The agreement, however, must be founded on a sufficient consideration ;[2] and the deed to be executed must not contain any conditions contrary to law, or in contravention of public policy.[3]

A covenant not to sue for the restoration of conjugal rights is a proper covenant to insert in a deed of separation, executed under a decree of the court, which directs articles of separation to be carried out; and such a covenant will be enforced by an injunction restraining the husband or wife from suing.[4] And an injunction will be granted to restrain a husband from molesting his wife, or a wife from molesting her husband contrary to covenants contained in deeds of separation.[5] Whether an injunction would be granted to restrain proceedings for a restitution of conjugal rights, when there has been merely an *agreement* for articles of separation, seems to be doubtful.[6]

It is well settled that when a separation deed has been actually executed, the court will enforce any of its stipulations which are in accordance with law.[7]

Some of the more recent authorities in this country have followed the ruling in Wilson *v.* Wilson. Thus, in Pennsylvania,

edition), where the English authorities are collected; Hill on Trustees, 668-9, (4th Am. ed.); Perry on Trusts, § 672. In Hunt *v.* Hunt, 4 D., F. & J. 221, the subject will be found most clearly explained by Lord Westbury.

[1] 1 H. L. Cas. 538 ; 5 Id. 40. See, also, Gibbs *v.* Harding, L. R., 5 Ch. 336; Charlesworth *v.* Holt, L. R., 9 Ex. 38 ; and Hart *v.* Hart, 18 Ch. D. 670.

[2] Walrond *v.* Walrond, Johns. 18 ; Beach *v.* Beach, 2 Hill, 260 ; Griffin *v.* Banks, 37 N. Y. 623.

[3] Vansittart *v.* Vansittart, 2 De G. & J. 255.

[4] Hunt *v.* Hunt, 4 D., F. & J. 221, where the subject is elaborately examined by Lord Westbury; Wilson *v.* Wilson, 1 H. L. Cas. 538. See, also, Williams *v.* Baily, L. R., 2 Eq. 731 ; Besant *v.* Wood, 12 Ch. D. 605 ; Clark *v.* Clark, 10 P. D. 188.

[5] Sanders *v.* Rodway, 16 Beav. 207 ; Flower *v.* Flower, 20 W. R. 231.

[6] See the remarks of Lord St. Leonards in Wilson *v.* Wilson, 5 H. L. Cas. 59, 60 ; and of Lord Chelmsford in Vansittart *v.* Vansittart, 2 De G. & J. 255.

[7] See Vansittart *v.* Vansittart, 2 De G. & J. 255. Note to Stapilton *v.* Stapilton, 2 Lead. Cas. Eq. 853.

Ohio, Massachusetts and Indiana, the law in that case has been expressly recognised ;[1] and the doctrine appears to be approved in Vermont.[2]

In other States, however, it has been held that equity will refuse to decree specific performance of separation articles.[3]

In England, and in some of the United States, the intervention of a trustee in a separation deed does not now appear to be necessary ;[4] but in other States the decisions are the other way.[5]

[1] Hitner's Appeal, 4 P. F. Sm. 114; see also Hutton *v.* Duey, 3 Barr, 100; Dillinger's Appeal, 11 Casey, 357; Thomas *v.* Brown, 10 Ohio St. 250; Fox *v.* Davis, 113 Mass. 255; Dutton *v.* Dutton, 30 Indiana, 455; see Smith *v.* Knowles, 2 Grant, (Pa.) 413, where a parol agreement for separation was held, under the circumstances, invalid; and also Switzer *v.* Switzer, 26 Grat. 574.

[2] See Barron *v.* Barron, 24 Verm. 375.

[3] See Champlin *v.* Champlin, 1 Hoff. Ch. 55; Simpson *v.* Simpson, 4 Dana, 140; Rogers *v.* Rogers, 4 Paige, 518; Carter *v.* Carter, 14 Sm. & Marsh. 59 McCrocklin *v.* McCrocklin, 2 B. Mon. 370; Collins *v.* Collins, Phillips Eq. 153; Hill on Trustees, 669 (4th Am. ed.). See also Switzer *v.* Switzer, 26 Grat. 574.

[4] Frampton *v.* Frampton, 4 Beav. 294; Hutton *v.* Duey, 3 Barr, 100; Barron *v.* Barron, 24 Verm. 375.

[5] Bettle *v.* Wilson, 14 Ohio, 257; Carson *v.* Murray, 3 Paige, 483; Tourney *v.* Sinclair, 3 How. (Miss.) 324; Watkins *v.* Watkins, 7 Yerg. 283; Simpson *v.* Simpson, 4 Dana, 140; Carter *v.* Carter, 14 Sm. & M. 59; Hill on Trustees, 669 (4th Am. ed.); Perry on Trusts, § 673.

CHAPTER V.

TRUSTS FOR CHARITIES.

116. Uncertainty in the object a characteristic of a charitable use.
117. Importance of charitable uses.
118. Origin of charitable uses; *Vidal* v. *Girard's Executors.*
119. Statute of Elizabeth.
120. Classification of charitable gifts; Gifts for eleemosynary purposes.
121. Gifts for educational purposes.
122 Gifts for religious purposes.
123. Gifts for public purposes.
124. Definition of a charitable use; Mr. Binney's definition; *Jackson* v. *Phillips.*
125. Characteristics of a charitable use; uncertainty of the object.
126. The *Cy pres* doctrine.
127. *Jackson* v. *Phillips.*
128. *Cy pres* doctrine in England, prerogative and judicial.
129. Soundness of the latter doctrine.
130. Rules of the different States.
131. Nature of the uncertainty which should avoid a charitable gift.
132. Resulting trusts in cases of charitable gifts; *Thetford School Case.*
133. Perpetuities and Accumulations.
134. Statutes of Mortmain.

116. It has already been said that three things are necessary to raise a valid trust—sufficient words to create it, a definite subject, and a certain or ascertained object. To this rule there is a very noticeable exception in the cases of trusts for charitable uses, wherein the trust will be sustained although the objects to be benefited may not be defined with that precision which would be requisite in trusts of an ordinary and private description. Uncertainty in the object is one of the characteristics of a true, technical, charitable use, because if the beneficiaries are defined with precision, the ordinary doctrines of equity, which have been already referred to, would be sufficient to support it.

It is when a trust, which, if it were for an individual, would fail for want of certainty in the object, is supported in equity because it is for a charity, that the term charitable use is to be in strictness applied. A trust for a charity which is declared with the same certainty in all respects as ordinary trusts, is, of course, capable of being sustained by the ordinary rules of property;[1]

[1] Thus a devise to a corporation to distribute the rents among twenty-four persons named, is not charitable, but it gives a vested right to each of the

but a trust which, according to those rules, would fail for uncertainty, is upheld in chancery when the beneficiaries are objects of charity, and is *then* a charitable use.[1]

117. Trusts for charitable uses have occupied a large share of the attention of courts of chancery both in England and in this country; and it is perhaps not too much to say that in the federal courts, and in the tribunals of many of the States of the Union, the questions which grow out of the doctrine of charitable uses have been discussed with a degree of industry, of learning, and of research, that can scarcely be paralleled in the annals of jurisprudence. A reference to the reports of the great cases in which the wills of Stephen Girard, of Sarah Zane, and of Francis Jackson were construed, will be sufficient to bear out the correctness of this assertion.[2]

118. These trusts had been at one time supposed, both in England and in this country to owe their origin to the statute of 43 Elizabeth, c. 4, commonly known as the statute of charitable uses; which was in point of fact an act designed merely to hunt up existing charities and enforce their administration; but which, because it enumerated certain trusts as charitable, came to be referred to as the origin of the jurisdiction of chancery over charitable uses, and as defining those uses which were to be considered charitable. This opinion existed in England,[3] and was adopted in the United States in the case of the Trustees of the Baptist Church *v.* Hart's Executors.[4] In 1844, how-

cestuis que trust. Liley *v.* Hey, 1 Hare, 580. See, also, Philadelphia *v.* Fox, 14 P. F. Sm. 182; Swift's Ex'rs *v.* The Beneficial Society, 23 P. F. Sm. 362; Old South Society *v.* Crocker, 119 Mass. 1. The subject is thoroughly discussed in the case last cited.

[1] Jackson *v.* Phillips, 14 Allen, 550; Perry on Trusts, § 687. See Ruth *v.* Oberbruner, 40 Wis. 263, as to the effect of the Wisconsin Statute and as to the meaning of the expression "trusts which are fully expressed and clearly defined."

[2] Vidal *v.* Girard's Executors, 2 Howard, 128; Philadelphia *v.* Girard's Heirs, 9 Wright, 27; Magill *v.* Brown, Brightly, 350; Jackson *v.* Phillips, 14 Allen, 539. See, also, Baptist Association *v.* Hart's Ex'rs., 4 Wheaton, 1; Inglis *v.* Sailor's Snug Harbor, 3 Peters, 99; Fontain *v.* Ravenel, 17 Howard, 387; Perin *v.* Carey, 24 Howard, 506; Lorings *v.* Marsh, 6 Wallace, 337; Gallego's Ex'rs. *v.* Att. Gen., 3 Leigh, 450; Kinnaird *v.* Miller's Ex'rs., 25 Gratt. 107; Witman *v.* Lex, 17 Serg. & Rawle, 88; Methodist Church *v.* Remington, 1 Watts, 218; Henry *v.* Deitrich, 3 Norris, 291; Dickson *v.* Montgomery, 1 Swan, 348; Green *v.* Allen, 5 Humph. 177; Frierson *v.* General Assembly, 7 Heisk. 693.

[3] 1 Spence's Eq. 589.

[4] 4 Wheaton, 1.

ever, in the great case of Vidal *v.* Girard's Executors,[1] this opinion was shown to be erroneous. In his celebrated argument in that case, Mr. Binney, one of the counsel for the will of Stephen Girard, showed, by reference to the proceedings of the Court of Chancery in the time of Queen Elizabeth (which had been published by order of the record commission), that that tribunal had exercised jurisdiction over trusts of this description prior to the passage of the statute of charitable uses. The cases mentioned in the report of the record commission are about fifty in number; and, although as to some of them it may not be satisfactorily demonstrated that they were instances of charitable uses, yet, upon the authority of these precedents, it is now settled that the jurisdiction of chancery upon this subject does not depend upon the statute, but existed independently of, and prior to, that enactment.

In the struggle with the pope, Henry VIII. was obliged to attack many charitable institutions for the purpose of asserting the power of the crown as against the claim of papal supremacy; and hence many charities were abolished by statute.[2] But in the reign of Elizabeth, after the conflict for ecclesiastical supremacy had been settled in favor of the English monarch, and the success of the Reformation had been assured, the necessity for institutions of an eleemosynary character began to re-assert itself, and several statutes were passed for the purpose of restoring and encouraging charitable foundations.[3] These acts finally culminated in the year 1601, in the statute of charitable uses, already mentioned.[4]

The question as to the origin of the jurisdiction upon this subject has this practical importance—viz., that in those States where the statute of Elizabeth is not in force or has not been adopted, the right of courts of equity to assume control over questions of this kind must depend upon their original jurisdiction.[5]

119. While, however, the statute of Elizabeth is not to be regarded as the *origin* of charitable uses, it has always been

[1] 2 Howard, 128.

[2] Perry on Trusts, § 691.

[3] 1 Eliz., c. 4, §§ 34, 40, 85; 8 Id. c. 11; 35 Id., c. 3; 39 Id., c. 4, 21; 31 Id., c. 6; 43 Id., c. 2 and 3. Perry on Trusts, § 691.

[4] 43 Eliz., c. 4; Perry on Trusts, § 692.

[5] See Pell *v.* Mercer, 14 R. Island, 412; and R. I. Hosp. Trust Co. *v.* Olney, Id. 449.

looked to as furnishing a definition of what uses are to be considered as charitable; although in those States in which the statute is not in force the courts will not confine themselves to the objects enumerated in the statute.[1] These uses are set forth in the preamble to the statute, and are as follows: "The relief of aged, and impotent, and poor people; the maintenance of sick and maimed soldiers and mariners; schools of learning; free schools; scholars in universities; houses of correction; repairs of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the marriages of poor maids; supportation and help of tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; and aid or ease of any poor inhabitants concerning the payment of fifteenths, setting out of soldiers and other taxes." In addition to the above, many other objects have been decided to be charitable, because they were analogous to those mentioned in the statute, and were considered to be in conformity with the spirit of the preamble, or, in other words, although not within the strict letter of the statute, they have been held to fall within its "equity." Thus a gift for the "advancement of the Christian religion among infidels" is a good charity.[2] So is a gift for repairing a church;[3] for building an organ-gallery;[4] for repairing a parsonage;[5] or for the "worship of God."[6] A gift for purposes of education is a charity,[7] and so is a gift to a town for public improvements.[8] On the other hand, trusts "for the political restoration of the Jews to Jerusalem;"[9] "to secure the passage of laws granting women a right to vote and hold office;"[10] "for a corporation to enable it to keep a larger supply of corn in London for the market;"[11] "to build a

[1] Witman *v.* Lex, 17 S. & R. 88; Tappan *v.* Deblois, 45 Maine, 122.

[2] Att. Gen. *v.* William and Mary's College, 1 Ves. Jr. 245.

[3] Att. Gen. *v.* Ruper, 2 P. Wms. 125.

[4] Att. Gen. *v.* Oakaver, 1 Ves. Sr. 536.

[5] Legard *v.* Hodges, 3 Bro. C. C. 441.

[6] Att. Gen. *v.* Pearson, 3 Merv. 353. See Decamp *v.* Dobbins, 29 N. J. Eq. 36.

[7] Vidal *v.* Girard; Whicker *v.* Hume, 7 H. L. Cas. 124; Smithsonian Inst. Case, 7 H. L. Cas. 156 (cited).

[8] Att. Gen. *v.* Heelis, 2 S. & St. 67.

[9] Habershon *v.* Vardon, 7 Eng. L. and Eq. 228; 4 De G. & Sm. 467.

[10] Jackson *v.* Phillips, 14 Allen, 571.

[11] Att. Gen. *v.* Haberdashers' Company, 1 My. & K. 420.

monument, tomb or vault for the donor;"[1] are illustrations of gifts which have been determined not to be charities. A gift for "charity" or for "charitable purposes," without adding more, is a good charitable bequest;[2] and so is a gift to a charitable association, although no charitable use is designated.[3]

120. The purposes for which charitable gifts may be made are so numerous that it is almost impossible to classify them; nevertheless, the four following heads, without including *all* possible charitable bequests, may be said to embrace a large majority of them:—

1. Gifts for strictly eleemosynary purposes, such as "to the poor,"[4] "to a parish,"[5] "for releasing poor debtors,"[6] "for a hospital,"[7] "for orphans,"[8] "for the benefit of fugitive slaves,"[9] "for poor relations,"[10] "for the relief of Indians,"[11] "for the relief of aged females,"[12] or for the suppression of the manufacture and sale of intoxicating liquors.[13]

121. 2. Gifts for educational purposes; as to a college for educating orphans,[14] for advancement of learning,[15] libraries,

[1] Hoare *v.* Osborne, L. R., 1 Eq. 585; though see Adnam *v.* Cole, 6 Beav. 353. A society for the purpose of benevolence among its members, only, is not a charity—Beaumont *v.* Meredith, 3 V. & B. 180; Babb *v.* Reed, 5 Rawle, 151; Swift *v.* Beneficial Society, 23 P. F. Sm. 362.

[2] Legge *v.* Asgill, Turn. & Rus. 265, n.; Mills *v.* Farmer, 19 Ves. 483; s. c. 1 Mer. 55; Perry on Trusts, § 705; Hill on Trustees, 452. But see Adye *v.* Smith, 44 Conn. 60.

[3] Evangelical Association's Appeal, 11 Casey, 316.

[4] Att. Gen. *v.* Matthews, 2 Lev. 167; Howard *v.* American Peace Society, 42 Maine, 288; Heuser *v.* Harris, 42 Ill. 425.

[5] Att. Gen. *v.* Blizard, 21 Beav. 233; Att. Gen. *v.* Old South Society, 13 Allen, 474; State *v.* Gerrard, 2 Ired. Eq. 310; Shotwell *v.* Mott, 2 Sand. Ch. 46; Overseers *v.* Tayloe, Gilm. 336.

[6] Att. Gen. *v.* Ironmongers' Co., 2 My. & K. 576.

[7] Corp. of Reading *v.* Lane, Duke, 81; Att. Gen. *v.* Kell, 2 Beav. 575; McDonald *v.* Massachusetts Hospital, 120 Mass. 432.

[8] Vidal *v.* Girard's Exrs., 2 How. 128.

[9] Jackson *v.* Phillips, 14 Allen, 571.

[10] Brunsden *v.* Woolredge, Amb. 507; Swasey *v.* American Bible Soc., 57 Maine, 527; Smith *v.* Harrington, 4 Allen, 566.

[11] Magill *v.* Brown, Brightly, 347.

[12] Gooch *v.* Association for Relief, etc., 109 Mass. 567.

[13] Haines *v.* Allen, 78 Ind. 100.

[14] Vidal *v.* Girard's Exrs., 2 Howard, 128; Clement *v.* Hyde, 50 Vermont, 716; Miller *v.* Atkinson, 63 N. C. 537. See, also, Paschal *v.* Acklin, 27 Tex. 173; Miller *v.* Porter, 3 P. F. Sm. 292.

[15] Stevens *v.* Shippen, 28 N. J. Eq. 487; Taylor *v.* Bryn Mawr Coll. Trustees, 34 N. J. Eq. 101; Whicker *v.* Hume, 1 DeG., M. & G. 506; 7 H. L. Cas. 123. See The President of the U. S. *v.* Drummond (the Smithsonian Institution Case), cited in this case.

and literary institutes,[1] for the diffusion of knowledge among the working classes,[2] to erect a free grammar school,[3] or to promote the moral, intellectual and physical instruction of a city,[4] to increase the salaries of teachers,[5] or for the foundation of scholarships and fellowships.[6]

122. 3. Gifts for religious purposes: as for the advancement of Christianity among the infidels,[7] for the dissemination of the gospel,[8] for foreign missions,[9] for distributing Bibles and religious tracts,[10] for the benefit of ministers of the gospel,[11] and for building, ornamenting, or repairing churches.[12] It may he here observed that the only religious use which is mentioned in the statute of Elizabeth is that for "repairs of churches," but bequests for religious and pious purposes have always been

[1] Daury *v.* Inhabitants of Natick, 10 Allen, 169; Donohugh *v.* The Library Company of Philadelphia, 5 W. N. C. 196 (C. P. No. 2 of Philadelphia County); Donohugh's Appeal, 5 Norris, 306. In the last case the definition of a public charity was called for with some precision. The Constitution of Pennsylvania exempted from taxation "institutions of *purely public charity;*" and the question was whether the Library Company of Philadelphia fell within that phrase. It was held that it did. "The Library," said Mitchell, J., in delivering the opinion of the Court below, "is a trust, and while it is the property of the corporation, and, therefore, in a certain sense, of the corporate stockholders, yet it is not their property in any full legal or commercial sense. . . Being thus a trust, its purpose and scope must be looked for in the grant. It is not a question of how the revenue is derived, *but to what purpose, and with what intent is it devoted.*" 5 Norris, 306. And this view was adopted by the Supreme Court. The same conclusion had been reached in the interpretation of a similar constitutional provision in Ohio by the Supreme Court of that State, Gerke *v.* Purcell, 25 Ohio St. 229; approved and followed in Humphries *v.* The Little Sisters, 29 Id. 205. See, also, Burd Orphan Asylum *v.* School District, 9 Norris, 21. See, in this connection, Miller's Ex'r. *v.* Commonwealth, 27 Grat. 116.

[2] Sweeney *v.* Sampson, 5 Ind. 465.

[3] Hadley *v.* Hopkins Acad., 14 Pick. 240; State *v.* McGowen, 2 Ired. Eq. 9.

[4] Lowell's Appeal, 22 Pick. 215; Pickering *v.* Shotwell, 10 Barr, 27.

[5] Price *v.* Maxwell, 4 Casey, 23.

[6] Rex *v.* Newman, 1 Lev. 284; Att. Gen. *v.* Andrew, 3 Ves. 633; Case of Jesus Col., Duke, 78; Att. Gen. *v.* Bowyer, 3 Ves. 714.

[7] Att. Gen. *v.* William and Mary's College, 1 Ves. Jr. 243.

[8] Att. Gen. *v.* Wallace, 7 B. Mon. 611; Burr *v.* Smith, 7 Verm. 241; Hinckley *v.* Thatcher, 139 Mass. 477.

[9] Bartlett *v.* King, 12 Mass. 537; Fairbanks *v.* Lamson, 99 Mass. 533.

[10] Att. Gen. *v.* Stepney, 10 Ves. 22; Winslow *v.* Cummings, 3 Cush. 358; Bliss *v.* American Bible Soc., 2 Allen, 334; Pickering *v.* Shotwell, 10 Barr, 23.

[11] Att. Gen. *v.* Gladstone, 13 Sim. 7; Cory Universalist Soc. *v.* Beatty, 28 N. J. Eq. 570; Pember *v.* Inhabitants of Kingston, Toth. 34.

[12] See cases cited, *supra*, p. 167, notes.

considered within the equity of the statute, and have always been upheld.[1] It may also be mentioned, here, that in England gifts for superstitious uses, that is, religious uses, which, according to the English ecclesiastical law, were illegal (as, for example, the maintenance of a priest to pray for the soul of the donor), were void. But in the United States there are no uses which can be denominated superstitious.[2] A trust, however, for an infidel society cannot be sustained.[3]

123. 4. Gifts for erecting or maintaining public buildings or works, or otherwise lessening the burdens of government;[4] and under this head may be comprehended all trusts for the building or repair of bridges, ports, causeways, sea-banks, for paving, cleansing and lighting a town, for erecting town houses, and bequests of a like character.[5]

It may be remarked, here, that when the subject of the trust is not the result of a gift, but of a contract or a statute, the use will not be a charitable one, for charity is necessarily based upon the idea of bounty, and cannot be predicated of an *agreement* to devote money to a benevolent object,[6] or of an *assessment* under a statute.[7]

124. From the above statement of the objects which have been considered charitable uses, it will be perceived that it is a task of no little difficulty to give a definition of a charitable use which shall be at the same time accurate and comprehensive.

Sir William Grant[8] said that those purposes are considered charitable which are enumerated in the statute of 43 Elizabeth, or which, by analogy, are deemed within its spirit and intendment; but it has been justly remarked that this definition leaves

[1] Perry on Trusts, § 701.

[2] Methodist Church *v.* Remington, 1 Watts, 218; Gass *v.* Wilhite, 2 Dana, 175; Miller *v.* Porter, 3 P. F. Sm. 292. Kehoe *v.* Kehoe, 22 Am. Law Reg. 665.

[3] Zeisweiss *v.* James, 13 P. F. Sm. 465–471.

[4] Jackson *v.* Phillips, 14 Allen, 556.

[5] Coggleshall *v.* Pelton, 7 Johns. Ch. 292; Bethlehem Borough *v.* Perseverance Fire Co., 31 P. F. Sm. 445; Mowry *v.* City of Providence, 10 R. Island, 52; State *v.* Griffith, 2 Del. Ch. 392–421; Cresson's Appeal, 6 Casey, 437; Hamden *v.* Rice, 24 Conn. 350; Magill *v.* Brown, Brightly, 347; Perry on Trusts, § 704; Thomas *v.* Ellmaker, 1 Pars. Eq. 98; Humane Fire Co.'s Appeal, 7 Norris, 389; Beaumont *v.* Oliveira, L. R., 4 Ch. 309.

[6] Brendle *v.* The German Reformed Cong., 9 Casey, 419; Swift *v.* The Beneficial Society, 23 P. F. Sm. 362.

[7] Att. Gen. *v.* Heelis, 2 Sim. & Stu. 77, per Sir J. Leach, V. C.

[8] In Morice *v.* Bishop of Durham, 9 Ves. 405.

something to be desired in point of certainty, and suggests no principle.[1]

Mr. Binney, in his great argument in the Girard Will Case, defined a charitable or pious gift to be "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private or selfish."[2] And this definition has been approved by the Supreme Court of Pennsylvania.[3] A more concise and practical rule is that of Lord Camden, adopted by Chancellor Kent, by Lord Lyndhurst, and by the Supreme Court of the United States—"a gift to a general public use, which extends to the poor as well as to the rich."[4] Mr. Justice Grey, in the Supreme Court of Massachusetts, in the case of Jackson *v.* Phillips, has defined a charity in its legal sense as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.[5]

This last definition, while not perhaps as concise as could be desired, is nevertheless both clear and comprehensive, and has already been adopted in text-books as the most satisfactory definition of a charitable use.[6]

125. The nature of a charitable use having been explained, it will be proper now to point out the principal characteristics of this trust, which have rendered it worthy of a separate consideration. These are, *first*, the uncertainty of its objects; and, *secondly*, the perpetuity of its existence.

It has already been pointed out that the chief characteristic

[1] Jackson *v.* Phillips, 14 Allen, 555.

[2] Vidal *v.* Girard's Exrs., 2 Howard, 128.

[3] Price *v.* Maxwell, 4 Casey, 35.

[4] Jones *v.* Williams, Ambl. 652; Coggeshall *v.* Pelton, 7 Johns. Ch. 294 Mitford *v.* Reynolds, 1 Phil. Ch. 191, 192; Perin *v.* Carey, 24 How. 506.

[5] 14 Allen, 555.

[6] Perry on Trusts, § 697.

of charitable uses was the fact that the objects of the trust were always, to a greater or less extent, uncertain;[1] and this characteristic of charitable uses has led to a doctrine peculiar to trusts of this sort, viz., that known as the *cy pres* doctrine.

126. The *cy pres* doctrine has been much discussed, if not a little severely criticized, and in many cases misunderstood. The very clear statement of the law upon this subject by Mr. Justice Grey in Jackson *v.* Phillips,[2] has done much to establish an accurate understanding of the doctrine.

The *cy pres* doctrine is one under which courts of chancery act, when a gift for charitable uses cannot be applied according to the exact intention of the donor. In such cases the courts will apply the gift, as nearly as possible (*cy pres*), in conformity with the presumed general intention of the donor; for it is an established maxim in the interpretation of wills, that a court is bound to carry the will into effect if it can see a general intention consistent with the rules of law, even if the particular mode or manner pointed out by the testator cannot be followed.[3] Good illustrations of this doctrine will be found in the Baliol College Case,[4] and in the Ironmongers' Case.[5]

127. Another instructive example may be found in the case of Jackson *v.* Phillips.[6] There, one of the trusts in the will was for "the preparation and circulation of books and newspapers, the delivery of speeches, lectures, and such other means as in their (the trustees) judgment will create a public sentiment that will put an end to negro slavery in this country," and for "the benefit of fugitive slaves escaping from the slave-holding States." After the death of the testator, but while the litigation upon his will was in progress, the amendment to the Constitution of the United States abolishing slavery was adopted. The immediate purpose for which the bequest was designed having thus failed, the case was referred to a master to report a scheme, *cy*

[1] *Supra*, pp. 164–165.

[2] 14 Allen, 539.

[3] Jackson *v.* Phillips, 14 Allen, 556; Bartlet *v.* King, 12 Mass 543; Inglis *v.* Sailor's Snug Harbor, 3 Pet. 117, 118; Moggridge *v.* Thackwell, 7 Ves. 69.

[4] Att. Gen. *v.* Guise, 2 Vern. 266; Att. Gen. *v.* Baliol Col., 9 Mod. 407; Att. Gen. *v.* Glasgow Col., 2 Collyer, 665; 1 H. L. Cas. 800.

[5] Att. Gen. *v.* Ironmongers' Co., Cr. & Ph. 208.

[6] 14 Allen, 571.

pres, for the application of the testator's bounty, and the fund was ultimately applied to the New England Branch of the American Freedmen's Union Commission.

128. The above cases will serve to illustrate the *cy pres* doctrine in its general aspect. In England, however, this doctrine appeared in two distinct shapes. It was, in the first place, applied in the exercise of a royal prerogative, delegated to the chancellor under the sign manual of the crown; and, in the second place, by the chancellor in the exercise of his ordinary equitable jurisdiction. By virtue of the first or prerogative power, the chancellor assumed to direct a scheme for the application of a charitable bequest when the particular charitable use designed by the testator was illegal, and therefore void, or when the gift was for an indefinite charitable purpose, and no trustees were named by the donor to carry it out.[1] Thus where a sum of money was bequeathed to a Jews' synagogue, which bequest, according to the law of England, was illegal, it was applied to the benefit of a foundling hospital. And a bequest for the education of poor children in the Roman Catholic faith has been disposed of by the king under his sign manual.[2] It is obvious that such an extravagant stretch of authority belongs to the executive rather than to the judicial department of government; but from the circumstance that this power was in England exercised by a judicial officer (the chancellor), it has come to be confounded with the purely judicial *cy pres* doctrine, and has necessarily tended to bring the latter into some disrepute.[3] The judicial *cy pres* doctrine is not, in fact, open to the same objections as the extraordinary assumption of power just described, and, within proper limits, seems to be a reasonable exercise of judicial discretion. The doctrine is this: Where a gift is made to a trustee for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid

[1] Moggridge *v.* Thackwell, 7 Ves. 83. See 1 Am. Law Reg. (N. S.) 400, 401.

[2] Story's Eq. Jurisp., § 1168.

[3] The term *cy pres* has also been used to designate the rule of construction which has sometimes been applied to executory devises or powers of appointment to individuals, in order to avoid the objection of remoteness. It was this doctrine which has been condemned by Lord Kenyon and Lord Eldon. See Brudenell *v.* Elwes, 1 East, 451: Sugden on Powers, Ch. 9, sec. 9; Jackson *v.* Phillips, 14 Allen, 574.

at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application; and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible, to carry out his general charitable intent.[1] The doctrine as thus stated is well settled by the highest authority in England,[2] and has received the sanction of a decision in this country, in which the subject has been most thoroughly and ably considered.[3] It may be added that this doctrine is applicable to cases in which the residuary gift is to charity. In other words, when a particular bequest to charity fails, the subject of the bequest will be applied as nearly as possible to that particular gift, and will not fall into a residuary legacy simply because *that* legacy also happens to be a charitable gift. This rule was laid down in The Mayor of Lyons *v.* The Advocate General of Bengal,[4] and the conclusion reached, after a careful examination of the subject, was that the jurisdiction of the court to act upon the *cy pres* doctrine, upon the failure of a specific charitable bequest, arises whether the residue be given to charity or not, unless upon the construction of the will a direction can be implied the bequest if it fails should go to the residue.[5]

129. As already stated, this doctrine seems to be free from objection; for it will be observed that thus stated it avoids both of the extravagant conclusions to which the prerogative

[1] Jackson *v.* Phillips, 14 Allen, 586.

[2] Att. Gen. *v.* Guise, 2 Vern. 266; Att. Gen. *v.* Baliol Col., 9 Mod. 407; Att. Gen. *v.* Glasgow Col., 2 Collyer, 665; 1 H. L., Cas. 800. See also Bloomfield *v.* Stowemarket, Duke, 624; Att. Gen. *v.* Hicks, 3 Bro. C. C. 166, note; Att. Gen. *v.* Craven, 21 Beav. 392; Moggridge *v.* Thackwell, 7 Ves. 36; Att. Gen. *v.* The Ironmongers' Co., 2 My. & K. 576; 2 Beav. 313; Cr. & Ph. 208; 10 Cl. & Fin. 908; Att. Gen. *v.* Gibson, 2 Beav. 317, note.

[3] Jackson *v.* Phillips, 14 Allen, 580, from which the statement of the doctrine in the text has been taken. See also City of Philadelphia *v.* Girard's Heirs, 9 Wright, 28.

[4] L. R., 1 App. Cas. 91.

[5] Id. See also Mills *v.* Farmer, 19 Ves. 486, and Ironmongers' Co. *v.* Att. Gen., 10 Cl. & F. 908.

cy pres doctrine led. The gift, if for a charity generally, must be made to *trustees*, thus avoiding the mischief of turning the court into a trustee for a general charity;[1] while, on the other hand, there must be no intention to limit the gift to a particular institution or mode of application, which avoids the obnoxious *cy pres* doctrine in those cases in which bequests were made to particular charitable uses, but which were applied by the exercise of the prerogative to different objects, because the use designated was illegal.

130. It is, nevertheless, true that the *cy pres* doctrine has in many cases in the United States been regarded with considerable disfavor.

In Fontain *v.* Ravenel,[2] the Supreme Court of the United States seemed to be opposed to the *cy pres* doctrine; but in Lorings *v.* Marsh,[3] the tendency was, perhaps, the other way.

In North Carolina, Connecticut, Indiana, Iowa and Alabama the *cy pres* doctrine has been repudiated.[4] In Pennsylvania, although the principles of the statute of Elizabeth were said to have been adopted, the *cy pres* doctrine was rejected;[5] but the doctrine to a limited extent was subsequently introduced by statute.[6] In Maryland and Virginia, neither the statute of Elizabeth nor its principles are in force, and charities are treated

[1] "Where money is given to charity generally," said Lord Eldon in Moggridge *v.* Thackwell, 7 Vesey, 36, "without trustees or objects selected, the king is constitutional trustee." In other words, the fund, in the absence both of trustees and definite objects, was applied at the pure will of the crown. It must be remembered, however, that where there is a charitable object pointed out, the trust will not be suffered to fail for want of a trustee. McGirr *v.* Aaron, 1 Penna. 49. See Perry on Trusts, § 722.

[2] 17 Howard, 369.

[3] 6 Wallace, 337.

[4] McAuley *v.* Wilson, 1 Dev. Eq. 276 (though, in the earlier case of Griffin *v.* Graham, 1 Hawks. 96, the tendency had been very much the other way); White *v.* Fisk, 22 Conn. 31; Grimes *v.* Harmon, 35 Ind. 198; Lepage *v.* McNamara, 5 Clarke, (Ia.) 147; Carter *v.* Balfour, 19 Alab. 814; though see Williams *v.* Pearson, 38 Alab. 307. In West Virginia, see Venable *v.* Coffman, 2 W. Va. 310.

[5] Witman *v.* Lex, 17 Serg. & Rawle, 88.

[6] Statute of 1855; P. L. 331. The Act of 1885, however, narrows the limits. P. L. 259. See, also, Zeisweiss *v.* James, 13 P. F. Sm. 465 (where Fontain *v.* Ravenel is approved), and Philadelphia *v.* Girard's Heirs, 9 Wright, 27.

as ordinary trusts;[1] and the same conclusion has at last been reached in New York and South Carolina.[2]

But in many of the States, on the other hand, the *cy pres* doctrine has been received with more favor. In all of the New England States it has been either directly countenanced, or left an open question.[3] In Missouri and Illinois, the doctrine has been approved.[4] In New Jersey the question has not been decided, although it has been said that a bequest which would be enforced in England might not be carried into effect in that State, on the ground of the indefiniteness of its objects, or the impracticability of its exact execution.[5]

There seems, indeed, to be no valid reason why the judicial *cy pres* doctrine, as explained in Jackson *v.* Phillips, should not be approved in all those states wherein the statute of Elizabeth has been decided to be in force, or where its principles have been adopted by the law of the State; in other words, in those States where the doctrine that indefiniteness of the object is no objection to a trust, provided it is for a charity, is recognised. This is the case in many of the States of the Union.[6]

[1] Dashiell *v.* Att. Gen., 5 Har. & J. 392; Wilderman *v.* Baltimore, 8 Maryl. 551; State *v.* Warren, 28 Id. 338 (see Needles *v.* Martin, 33 Id. 618); Provost of Dumfries *v.* Abercrombie, 46 Id. 172; Gallego *v.* Att. Gen., 3 Leigh, 450; Baptist Association *v.* Hart's Exrs., 4 Wheat. 1.

[2] Bascom *v.* Albertson, 34 N. Y. 584; Pringle *v.* Dorsey, 3 So. Car. (N. S.) 509. See, also, Beekman *v.* Bonsor, 23 New York, 308.

[3] Burr *v.* Smith, 7 Verm. 287; Brown *v.* Concord, 33 N. Hamp. 296; Jackson *v.* Phillips, 14 Allen, 570; Derby *v.* Derby, 4 R. Island, 439; Howard *v.* American Peace Soc., 49 Maine, 302.

[4] Academy *v.* Clemens, 50 Missouri, 167; Gilman *v.* Hamilton, 16 Ill. 231.

[5] Thomson's Exrs. *v.* Norris, 5 C. E. Green, 522. The point, however, was not before the court for decision in this case. See, also, Att. Gen. *v.* Moore's Exrs., 4 C. E. Green, 503.

[6] See Vidal *v.* Girard, 2 Howard, 128; Perin *v.* Carey, 24 Howard, 465; Hadley *v.* Hopkins Academy, 14 Pick. 240; Going *v.* Emery, 16 Pick. 107; Treat's Appeal, 30 Conn. 113; Witman *v.* Lex, 17 Serg. & Rawle, 88; Zane's Will, Brightly, 350; Pickering *v.* Shotwell, 10 Barr, 27; Williams *v.* Pearson, 38 Alab. 305; McCord *v.* Ochiltree, 8 Blackf. 15; Beall *v.* Fox, 4 Geo. 404; Wade *v.* Am. Col. Soc., 7 S. & M. 663; Dickson *v.* Montgomery, 1 Swan (Tenn.) 348; Urmey's Exrs. *v.* Woodeu, 1 Ohio St. (N. S.) 160; Johnson *v.* Mayne, 4 Clarke (Iowa), 180; Miller *v.* Chittenden, Id. 252; Preachers' Aid Soc. *v.* Rich, 45 Maine, 552; Trustees *v.* Chambers, 3 Jones' Eq. 253; Potter *v.* Thornton, 7 R. Island, 252; Meeting Street Baptist Soc. *v.* Hail, 8 Id. 239; Walker *v.* Walker, 25 Georgia, 420; Church *v.* Church, 18 B. Mon. 635 (see Rev. Stats. of Kentucky, 1860, c. 14, § 1); Chambers *v.* St. Louis, 29

131. While, however, the reasonable *cy pres* doctrine may be sustained, it is, nevertheless, true that many bequests for charitable purposes are, even in England, considered void by reason of uncertainty;[1] although it is submitted that when properly considered, the uncertainty which avoids the gift is not so much a vagueness in the charitable purpose, as an uncertainty whether the trustees are bound to apply the gift in charity at all. Thus, in Ellis *v.* Selby[2] the gift was to trustees "to pay and apply the fund to and for such charitable or other purposes as they should think fit;" and it was held that the gift was void, because, from the alternative nature of the bequest, it was not incumbent upon the trustees to apply the fund to *charitable* uses only. And although in several other cases in which this rule has been applied, the alternative nature of the gift has not been so apparent,[3] yet it is conceived that the true test to be applied is that suggested by Sir William Grant, in Morice *v.* The Bishop of Durham, viz., whether the property can consistently with the will be applied to other than charitable purposes; if it can, the trust is too indefinite.[4] Such was the test recently recognised in Michigan, in The Attorney-General *v.* Soule,[5] where the rule laid down by Sir William Grant was expressly followed. But if the general charitable nature of the trust is imperative, and a trustee has been appointed, it is conceived that the better opinion now is, that such a trust will be carried out by the court in spite of

Missouri, 543; Paschal *v.* Acklin, 27 Tex. 173.

[1] Or because it is impossible to compel the trustees to execute the gift, and it is out of the question, without such concurrence, to execute such gift at all. New *v.* Bonaker, L. R., 4 Eq. 655. In this case there was a bequest to the President and Vice President of the United States and the Governor of Pennsylvania, upon trust to build and endow a college for the instruction of youth in the State of Pennsylvania; and the testator directed that moral philosophy should be taught in the college, and that a professor should be engaged to inculcate and advocate the natural rights of black people, of every clime and country, until they should be restored to an equality of rights with their white brethren throughout the Union. The trustees having disclaimed, the court held that as they had no power to enforce the trust, they could not settle a charity *cy pres*.

[2] 7 Sim. 352; 1 M. & Cr. 286; Thomson *v.* Shakespeare, Johnson, Ch. 612. See, however, Dolan *v.* Macdermot, L. R., 3 Ch. 676.

[3] Williams *v.* Kershaw, 5 Cl. & Fin. 111; Morice *v.* The Bishop of Durham, 9 Ves. 404; Thompson's Ex'rs. *v.* Norris, 5 C. E. Green, 489.

[4] 9 Ves. 404; see, also, Rotch *v.* Emerson, 105 Mass. 431.

[5] 28 Mich. 153-156.

the vagueness or uncertainty in the gift.[1] It must be remembered, however, that it was decided in Fontain *v.* Ravenel,[2] that when a discretion as to the application of the fund to charitable purposes had been vested in executors, and those executors died during the pendency of a prior life estate, the court would not exercise the discretion, and the gift would fail. And this rule seems to be approved in Pennsylvania.[3]

132. It sometimes happens that the particular charitable purposes specified or supposed to be contemplated by the testator do not exhaust the whole of the income of the property devoted by the will to charity. The general rule may be stated to be that if an intention can be gathered from the will to devote the whole to charity, the circumstance that the specific appropriation covers only a certain part, or that the estate afterwards becomes of a value more than sufficient to satisfy the requirements of the gift, will not create a resulting trust *pro tanto* for the heir or the next of kin, but that the surplus also will be devoted to the charitable purpose. This doctrine has existed since the time of Lord Coke, and is generally referred to as the rule in the Thetford School Case.[4] In that case, the testator, having land let at a rent of 35*l.* a year, bequeathed a sum of 35*l.* a year "to the charitable uses hereinafter mentioned, that is to say," and then he said to the schoolmaster so much, to the usher so much, proportions of the whole. In the process of time, the rents increased to a greater yearly value than 35*l.*, and it was decided that the surplus also was to be appropriated to the charity.[5] However, if the testator, by the terms of the bequest, takes notice of the fact that the payments are less than the amount of the rents, there will be either a resulting trust, or the surplus will belong to the person to whom the estate is given, and by whom the payments are to be made.[6]

[1] Saltonstall *v.* Sanders, 11 Allen, 462; McLain *v.* School Directors, 1 P. F. Sm. 199; Appeal of Children's Hospital, 10 W. N. C. 313; Perry on Trusts, § 712.

[2] 17 How. 369.

[3] Zeisweiss *v.* James, 13 P. F. Sm. 465.

[4] 8 Rep. 130 b.

[5] See, also, Mayor of Beverly *v.* Att. Gen., 6 H. L. Cas. 318; Att. Gen. *v.* Dean of Windsor, 8 H. L. Cas. 369; Girard *v.* Philadelphia, 7 Wal. 1; Att. Gen. *v.* Wax Chandlers' Company, L. R., 8 Eq. 452; 2 Redfield on Wills, 796.

[6] Mayor of Beverly *v.* Att. Gen., 6 H. L. Cas. 310; Hill on Trustees, 129.

In this class of cases, however, it is difficult, and perhaps impossible, to lay down any general rule. The decision in each case must depend upon the instrument to be construed and the facts.[1]

133. Another characteristic of a charitable use which demands attention, is the fact that it is not subject to the ordinary rules in regard to perpetuities. Ordinarily, a perpetuity will no more be tolerated when it is covered with a trust than when it displays itself undisguised in a settlement of the legal estate,[2] and therefore a perpetual trust cannot be created for an individual and his heirs in succession, for ever.[3] But when the trust is for a charity, it is no objection to it that the property may remain in the hands of the trustees and their successors for all time.[4] Indeed, it is often one of the main objects of a gift to charity that the charitable use of the property should be perpetual; and moreover it must be remembered, that from this devotion to charitable uses, it does not necessarily follow that the property is never to be alienated, for the court can decree the sale of any trust property when the exigency of the case arises.[5] In New York, however, trusts for charities, under the peculiar law of that State, are subject to the rules against perpetuities in the same way as ordinary trusts.[6]

In general, trusts for accumulation beyond the period allowed by the common law, *i. e.*, a life or lives in being and twenty-one years afterwards, are void;[7] but in the case of trusts for charities, where there are no statutory regulations upon the subject, trusts for accumulation beyond the common-law period are allowed.[8]

If, however, the charitable trust is not to vest until after the determination of a prior gift, and that prior gift may by possi-

[1] Perry on Trusts, § 725.

[2] Lewin on Trusts, 132; Duke of Norfolk's Case, 3 Ch. Cas. 20; Perry on Trusts, § 33.

[3] Thellusson *v.* Woodford, 4 Ves. 227; 11 Ves. 112.

[4] Perin *v.* Carey, 24 How. 495; Yard's Appeal, 13 P. F. Sm. 99; Andrews *v.* Andrews, 110 Ill. 223; Curran *v.* Trust Co., 15 Phila. 84.

[5] Perry on Trusts, § 737; Id., § 24, and cases cited in note; Brown *v.* Meeting St. Bapt. Soc., 9 R. I. 177; Barr *v.* Weld, 12 Harris, 84.

[6] Levy *v.* Levy, 33 N. Y. 97; Bascomb *v.* Albertson, 34 Id. 584.

[7] Perry on Trusts, §§ 393, 394.

[8] See Odell *v.* Odell, 10 Allen, 1; City of Philadelphia *v.* Girard's Heirs, 9 Wright, 9. This last case is distinguished from the case of Hillyard *v.* Miller, 10 Barr, 326; Perry on Trusts § 738.

bility last longer than the time allowed by law, the gift over to charity will be void, because of the perpetuity in the first taker.[1] Of course this rule would not apply when the first gift is to a charity.[2]

134. In England a conveyance or devise of real estate in trust for a charitable or public institution, being a *corporation*, is inoperative by the statute of mortmain unless sanctioned by a license from the crown.[3] These statutes, however, are not in force and have not been adopted in the United States, and the English decisions upon this subject are therefore of no importance in this country.[4]

CHAPTER VI.

TRUSTEES; THEIR POWERS AND DUTIES.

135. Jurisdiction of Courts of Equity over trustees.
136. Who may be a trustee; corporations.
137. Acceptance of the trust.
138. General duties of trustees.
139. Conversion of securities; deposits.
140. Investments by trustees; English rule.
141. Rules in the United States.
142. When trustees are chargeable with interest.
143. Trustee cannot use his position for his own advantage.
144. Compensation of trustees; difference between English rule and that in most of the United States.
145. Trustee cannot delegate his authority.
146. Responsibility for acts of co-trustee.
147. Remedies for breach of trust
148. Trustees' Accounts.

135. The general nature of a trust having been explained, and the different modes in which the relationship of trustee and

[1] Hillyard *v.* Miller, 10 Barr, 335; City of Philadelphia *v.* Girard's Heirs, 9 Wright, 29; Perry on Trusts, § 736.

[2] Christ's Hospital *v.* Grainger, 16 Sim. 83; 1 MacN. & G. 460; McDonough *v.* Murdoch, 15 Howard, 415; Potter *v.* Thornton, 7 R. I. 252; Perry on Trusts, § 736.

[3] Hill on Trustees, 455.

[4] 2 Kent's Com. 282. In Pennsylvania the statutes of mortmain were reported to be in force by the judges; see 3 Binney App. 626; but a contrary opinion has been subsequently expressed. Magill *v.* Brown, Brightly, 350; Vidal *v.* Girard's Ex'rs., 2 Howard, 128.

cestui que trust may arise having been pointed out, it will be proper now to proceed to a brief consideration of some of the rules by which the conduct of the holder of the legal title is governed, and by which his relations with co-trustees, with strangers, and with the *cestui que trust* are regulated. The promulgation and enforcement of these rules fall necessarily and properly within the jurisdiction of courts of equity, for it is but reasonable that those courts, after having called the equitable title into existence, should continue to exercise over it a constant care and supervision.[1] Equity affords this protection by appointing and removing trustees, by superintending their discharge of the duties of the trust, by regulating their liability, and finally by affording the trustees, upon a proper application and upon proper cause shown, the advice and assistance of the court.

Moreover, if a trustee wishes to be relieved of the duties of his office, he must, as a general rule, apply to a court of equity to be discharged. He cannot discharge himself of his trust without the assent of the *cestui que trust*, or the direction of a court of chancery.[2]

The manner in which courts of equity interfere for these purposes depends, at the present day, very much upon statutory regulations; and the liabilities and duties of trustees are also, in very many instances, governed by statutes, the details of which in the different States, and in England, it would be quite impossible, in a treatise like the present, to explain. Nor is it possible to enter into a discussion of all the different duties which trustees are called upon to discharge, for they necessarily vary with the varied purposes for which trusts are created. They have been most elaborately examined in modern times in works devoted expressly to the subject. It is desirable, however, before leaving the consideration of the subject of trusts, that some of the more general questions connected with the jurisdiction of chancery over trustees should be noticed.

136. Any reasonable being may be a trustee;[3] and a corpora-

[1] See Dorsey *v.* Garey, 30 Maryl. 489, 495.

[2] Shepherd *v.* McEvers, 4 Johns. C. R. 136.

[3] Infants, married women, and bankrupts may be trustees. See Perry, § 48 *et seq.* "But it does not follow that whoever is capable of taking a trust is capable of performing or executing it. The inquiry then is not so much who

tion, though it has but an artificial existence, may be a trustee for purposes germane to the objects of its corporate life.[1] The United States, and each one of the separate States, may sustain the character of trustees.[2] The only difficulty in such cases is the same as that which existed in England when the king was trustee, viz., in enforcing a decree of a court against the sovereign power.[3] Gifts to unincorporated societies in trust for charitable purposes have been sustained in equity, although the decisions on this point have not been uniform.[4] If a valid trust has been created, and no trustee has been appointed, or a trustee has been appointed who is incompetent to act, equity will appoint a trustee; for it is a cardinal maxim in courts of chancery upon this subject, that a trust shall never be suffered to fail for want of a trustee.[5] Thus, if a corporation should be designated as a trustee, and the objects of the trust should be such that the corporation, from its very nature, would be incapable of carrying them out, a court of chancery will appoint a trustee who will be able to discharge the duties of the trust.[6]

137. In cases of express trusts it is necessary that the trust should be accepted by the trustee, either expressly or impliedly; and whether there has been such an acceptance is a question of fact of a kind proper for the determination of a jury.[7] The

may take in trust, as who may execute and perform a trust." Perry, § 39. In re Tempest, L. R., 1 Ch. 487.

[1] Vidal *v.* Girard's Exrs., 2 How. 188, 190; Girard *v.* Philadelphia, 7 Wal. 1; McDonough *v.* Murdoch, 15 How. 367; Philadelphia *v.* Fox, 14 P. F. Sm. 169; the Mayor *v.* Elliott, 3 Rawle, 170; Cresson's Appeal, 6 Casey, 447; Commissioners *v.* Walker, 6 Howard, (Miss.) 184. As to corporations being trustees, see Perry, §§ 42-43, and cases there cited, also §§ 44 to 47 inclusive.

[2] McDonough's Exrs. *v.* Murdoch, 15 How. 367; Case of the Smithsonian Institution, cited in Whicker *v.* Hume, 7 H. L. Cas. 141; U. S. Stats., vol. v., p. 64; ix., p. 102; Milford *v.* Reynolds, 1 Phill. 185; Nightingale *v.* Goulburn, 2 Phill. 594; 5 Hare, 484. It was deemed that the U. S. could be trustee in Levy *v.* Levy, 33 N. Y. 97; Shoemaker *v.* Comrs. 36 Ind. 176; Perry, § 41.

[3] See New *v.* Bonaker, L. R., 4 Eq. 655; Hill on Trustees, 50; Perry on Trusts, §§ 40, 41. *Ante*, § 52.

[4] Vidal *v.* Girard, 2 How. 127; Burbank *v.* Whitney, 24 Pick. 146; Magill *v.* Brown, Brightly, 350; Pickering *v.* Shotwell, 10 Barr, 27; though see Baptist Association *v.* Hart, 4 Wheat. 1; Perry on Trusts, § 46.

[5] Perry on Trusts, § 38.

[6] Vidal *v.* Girard (*supra*); Sonley *v.* Clockmakers' Co., 1 Bro. Ch. 81; Perry on Trusts, § 45.

[7] Armstrong *v.* Morrill, 14 Wal. 139.

best and most effectual method of accepting a trust is by signing the trust deed; but an acceptance may be equally inferred from any acts of the trustee in and about the execution of the trust.[1] If it is desired not to accept the trust, great care should be exercised not to do any act which might be construed into an acceptance. Even an instrument, drawn for the purpose of *disclaiming* a trust, has been construed to be an accepance of it, because it was in the form of a conveyance, which was a dealing with the trust estate.[2]

138. The duties of trustees may be said in general terms to be embraced in the obligation to protect and preserve the trust property, and to see that it is employed solely for the benefit of the *cestui que trust*. Thus, trustees for the payment of debts should take care that all the assets are properly got in, that as much as possible is realized from them, that creditors are ascertained, their claims investigated, and the funds properly applied in the due payment of their demands.[3] Trustees for sale are to see that a sale takes place within a reasonable time,[4] that the property is disposed of on the most advantageous terms, that all means are used for the purpose of obtaining buyers and securing a fair sale, and that the purchase-money is collected. Trustees for charities must take care that the income is applied to the charitable purposes to which it was directed by the instrument creating the trust, and none other, and that the wishes of the donor are carried out consistently with the rules of law. In fine, it would be impossible to enumerate the duties which the multifarious purposes for which trusts are created impose upon the trustees—for to do so would be to write a work not upon the general principles of equity, but upon trusts.

139. The first general duty of trustees is to take possession of the trust property, to call in debts, and to convert such securities as are not legal investments. In converting securities they must exercise a sound discretion to sell in the most advantageous

[1] Perry on Trusts, § 260.

[2] Crewe *v.* Dicken, 4 Ves. 97; Urch *v.* Walker, 3 M. & C. 702; Perry on Trusts, § 271.

[3] Chambersburg Saving Fund Association's Appeal, 26 P. F. Sm. 293.

[4] See Walker *v.* Shore, 19 Ves. 387; Hunt *v.* Bass, 2 Dev. Eq. 297; Morris *v.* Morris, 4 Jur. N. S. 802–964.

manner and at the most advantageous time.[1] They ought not to suffer trust property to remain in securities not authorized by law, unless there is something in the instrument creating the trust to justify such a course. As personal securities are not recognised by law as a proper investment, an executor should not allow the assets to remain outstanding in such securities, although the loan or investment had been made by the testator himself.[2] Of course there is no duty to convert securities, if by the terms of the trust instrument there is a sufficient indication that the *cestui que trust* was intended to enjoy the interest, income, or dividends of the specific securities.[3]

After securities have been converted, the funds should be deposited in a proper place.

A trustee will not be liable for the failure of a bank in which trust funds have been deposited, if he has suffered them to remain there only for a reasonable time;[4] but if he allows them to lie there by way of investment, he will be liable to make good their loss.[5] But he must be careful to make the deposit in the name of the trust estate, and not to his own credit; and not to mix trust funds with his own, otherwise he will be liable.[6]

140. Supposing the trust property to have been converted into cash, the next duty of the trustee will be to see that the fund is invested in proper securities, and in such a way that it may be made available for the purposes of the trust.

[1] Perry on Trusts, § 439.

[2] Powell *v.* Evans, 5 Ves. 839; Greyburn *v.* Clarkson, L. R., 3 Ch. 606; Hemphill's App., 6 Harris, 303; Pray's Appeal, 10 Casey, 100 (overruling Barton's Appeal, 1 Pars. Eq. 24); Kimball *v.* Reding, 11 Foster, 352; King *v.* Talbot, 40 New York, 76; Perry on Trusts, § 440; Hill on Trustees, 582 (4th Am. ed.).

[3] Perry on Trusts, §§ 450, 451; Hill on Trustees, *ut sup.*

[4] Rowth *v.* Howell, 3 Ves. 565; Swinfen *v.* Swinfen, (No. 5), 29 Beav. 211.

[5] Rehden *v.* Wesley, 29 Beav. 213; Moyle *v.* Moyle, 2 R. & M. 710; Johnston *v.* Newton, 11 Hare, 160; Perry on Trusts, § 443.

[6] Wren *v.* Kirton, 11 Ves. 337; McAlister *v.* Commonwealth, 4 Casey, 486; Jenkins *v.* Walter, 8 G. & J. 218; Lukens's Appeal 7 Watts & Serg. 48; Stanley's Appeal, 8 Barr, 431; Royer's Appeal, 1 Jones, (Pa.) 36; De Jarnette *v.* De Jarnette, 41 Alab. 709; Perry on Trusts, §§ 443, 463. See, also, Frith *v.* Cartland, 2 Hen. & M. 417; Marine Bank *v.* Fulton Bank, 2 Wallace, 252; Kip *v.* The Bank of New York, 10 Johns. 65; Kennedy *v.* Strong, Id. 289; School, etc., *v.* Kirwin, 25 Ill. 73; Brown *v.* Ricketts, 4 Johns. Ch. 303; Hill on Trustees, 575 (4th Am. ed.).

As courts of equity in England were in the habit of directing moneys which were in the custody of the court to be invested in 3*l.* per cent. annuities, it came to be considered an established duty on the part of trustees to invest trust moneys in those funds.[1] Several statutes, however, have been passed by which many other securities have been designated as lawful investments for trustees. Thus trustees are now allowed by act of parliament to invest in real securities in any part of the United Kingdom, and Bank of England, or Bank of Ireland, or East India Stock; unless such investments are expressly forbidden by the trust instrument.[2]

141. A trustee cannot invest the trust funds in personal securities; and even if he has a discretion as to investments, it is not a sound exercise of that discretion to invest in such securities. This is the rule in England and in the United States.[3] So, also, for a trustee, in the absence of express authority, to employ trust funds in trade or speculation, will be a gross breach of trust.[4] In England a trustee must not invest in bank stock or shares of public companies, and the rule is the same in New York and Pennsylvania.[5] But in Massachusetts the rule is different.[6]

Mortgages on real estate are considered proper investments

[1] Smith's Manual of Equity, 194. See Brown *v.* Wright, 39 Georgia, 26; King *v.* Talbot, 40 New York, 76.

[2] 22 and 23 Vic., c. 35, § 30; 23 and 24 Vic., c. 35 § 11; Id., c. 145; 30 and 31 Vic., c. 132, § 1. See Hill on Trustees, 560 (4th Am. ed.).

[3] Walker *v.* Symonds, 3 Swans. 81, note (*a*), citing Ryder *v.* Bickerton, (where Lord Hardwicke said that "a promissory note is evidence of a debt, but not security for it"); Adye *v.* Feuilletau, 1 Cox 25; Holmes *v.* Dring, 2 Cox, 1; Smith *v.* Smith, 4 Johns. Ch. 281; Nyce's Estate, 5 Watts & Serg. 256; Swoyer's Appeal, 5 Barr, 377; Wills's Appeal, 10 Harris, 330; Gray *v.* Fox, Saxton (Ch.), 259; Harding *v.* Larned, 4 Allen, 426; Clark *v.* Garfield, 8 Allen, 427; Moore *v.* Hamilton, 4 Flor. 112; Spear *v.* Spear, 9 Rich. Eq. 184 (see, however, Nance *v.* Nance, 1 S. Carolina (N. S.), 209); Barney *v.* Saunders, 16 Howard, 545; Perry on Trusts, § 453.

[4] Perry on Trusts, § 454. See Poole *v.* Munday, 103 Mass. 174, for an exceptional case where the rule was not enforced.

[5] Ackerman *v.* Emott, 4 Barb. 626; Hemphill's Appeal, 6 Harris, 303; Worrell's Appeal, 10 Harris, 44; Perry on Trusts, § 456; Hill on Trustees, 578 (4th Am. ed.).

[6] Harvard Coll., *v.* Amory, 9 Pick. 446; Lovell *v.* Minot, 20 Pick. 116; Perry on Trusts, § 456.

for trustees in the United States, and in England the investment in such securities is now authorized by statute.[1]

In several of the United States the subject of investments by trustees is expressly regulated by statute.[2]

142. A trustee is chargeable with interest on balances that he improperly retains in his hands, and sometimes with compound interest;[3] and he is also so chargeable when he mixes the trust funds with his own and deposits them in his own name,[4] but not otherwise.[5] Moreover, if a trustee is directed by a trust instrument to invest in a particular stock, and neglects to do so, the *cestui que trust* has his election to take the money and legal interest thereon, or so many shares of stock as the money would have purchased at the time when the investment ought to have been made, and the dividends on the same.[6] And so, if a trustee embarks the trust funds in business, the *cestui que trust* may take either the amount with interest, or the profits of the business.[7]

143. It is one of the fundamental principles of trusts, that a trustee cannot use his position as a trustee for his own advantage in any way.[8] He must have an eye single to the interests of the *cestui que trust.* The rule in the Rumford Market case, and similar cases already noticed under the head of Constructive Trusts, are illustrations of the strictness with which this rule is

[1] Perry on Trusts, §§ 457, 458; Stat. 22 and 23 Vic., c. 35 (Lord St. Leonard's Act.).

[2] Perry on Trusts, § 459.

[3] See Penny *v.* Avison, 3 Jur. (N. S.) 62; Schiefflin *v.* Stewart, 1 Johns. Ch. 620; Manning *v.* Manning, Id. 536 (see Minini *v.* Cox, 5 Id. 448, for a case in which the trustee was not charged); Bruner's Appeal, 7 P. F. Smith, 46; Gray *v.* Thompson, 1 Johns. Ch. 82; Norris's Appeal, 21 P. F. Sm. 123.

[4] Verner's Estate, 6 Watts, 251; Dyott's Appeal, 2 W. & S. 565; Robinett's Appeal, 12 Casey, 174; Wistar's Appeal, 4 P. F. Sm. 60; Hess's Estate, 18 Id. 458.

[5] Hess's Estate, *supra.*

[6] Shepherd *v.* Mouls, 4 Hare, 504; Robinson *v.* Robinson, 1 De G., M. & G. 256; Byrchall *v.* Bradford, 6 Mad. 235; Perry on Trusts, § 469. See, also, McIntire *v.* Zanesville, 17 Ohio St. 352; Norris's Appeal, 21 P. F. Sm 125, and Lamb's Appeal, 8 P. F. Sm. 142.

[7] Jones *v.* Foxall, 15 Beav. 392; Robinett's Appeal, 12 Casey, 174; Kyle *v.* Barnett, 17 Alab. 306; Barney *v.* Saunders, 16 How. 543; McKnight's Ex'rs. *v.* Walsh, 8 C. E. Green, 146; Perry on Trusts, § 470. See Whitney *v.* Smith, L. R., 4 Ch. App. 513.

[8] Green *v.* Winter, 1 Johns. Ch. 36; Kepler *v.* Davis, 30 P. F. Sm. 157; Aberdeen Town Council *v.* Aberdeen University, L. R., 2 App. Cas. 549.

enforced.[1] A trustee cannot make any profit at the expense of the trust estate;[2] he cannot use trust funds for his own benefit; he cannot buy in trust property for himself at his own sale, or a sale procured by him, nor can he buy up any debt, charge, or encumbrance to which the trust estate is liable, at less than is actually due thereon, and then collect the full amount from the estate.[3] And it has been held in many cases that a trustee may not even purchase the trust property at a judicial sale, brought about by a third party, and which he had taken no part in procuring;[4] although upon this point there are several authorities the other way.[5] Contracts between a trustee and *cestui que trust may* be made, but they are scrutinized by the courts with great severity.[6]

144. The rule that a trustee can obtain no benefit whatever from his position, was in England carried to the extent of holding that he was not even entitled to compensation for his trouble and responsibility in the care and management of the trust estate, unless it was expressly allowed in the trust instrument;[7] and this rule applies also to executors, guardians, receivers, directors of corporations, and in general to all fidu-

[1] *Ante*, § 92 *et seq.* See, also, Blauvelt *v.* Ackerman, 5 C. E. Green, 141; Washington R. R. Co. *v.* Alexandria R. R. Co., 19 Grat. 592; Boerum *v.* Schenck, 41 N. Y. 182.

[2] As to trustees' liability for profits, see Springer's Estate, 1 P. F. Sm. 343.

[3] Burgess *v.* Wheate, 1 Eden, 226; Sugden *v.* Crossland, 3 Sm. & Gif. 192; Robinson *v.* Pett, 3 P. Wms. 251, n. (*a*); Michoud *v.* Girod, 4 Howard, 503; Pooley *v.* Quilter, 4 Drew, 184; 2 De G. & Jo. 327; Schoonmaker *v.* Van Wyck, 31 Barb. 457; Herr's Estate, 1 Grant, (Pa.) 272; Parshall's Appeal, 15 P. F. Sm. 235; Barksdale *v.* Finney, 14 Grat. 338; Green *v.* Winter, 1 Johns. C. R. 27.

[4] Obert *v.* Obert, 1 Beas. 423; Ricketts *v.* Montgomery, 15 Maryl. 46; Jamison *v.* Glascock, 29 Missouri, 191; Bank *v.* Dubuque, 8 Clark, (Ia.) 277; Elliott *v.* Pool, 3 Jones Eq. 17; Campbell *v.* Johnson, 1 Sandf. Ch. 148; Chandler *v.* Moulton, 33 Verm. 245; Martin *v.* Wynkoop, 12 Ind. 266; Ogden *v.* Larrabee, 57 Ill. 389.

[5] Prevost *v.* Gratz, 1 Pet. C. C. 364; Fisk *v.* Sarber, 6 Watts & Serg. 18; Chorpenning's Appeal, 8 Casey, 315; Elrod *v.* Lancaster, 2 Head, 571; Mercer *v.* Newsom, 23 Georgia, 151; Huger *v.* Huger, 9 Rich. Eq. 217; Earl *v.* Halsey, 1 McCart. 332; Hill on Trustees, 249, 250, note (4th Am. ed.); note to Fox *v.* Macreth, 1 Lead. Cas. Eq. 216, 217 (3d Am. ed.). See *ante*, p. 137 (§ 94).

[6] Perry on Trusts, § 428. *Post*, Part II., Chap. II., Sec. III.

[7] Robinson *v.* Pett, 3 P. Wms. 251; 2 Lead Cas. Eq. 206, and notes.

ciaries.[1] But this rule has not been adopted in the United States; and trustees and other fiduciaries in this country are entitled to a reasonable compensation for their services.[2] The *amount* is in some States fixed by statute, and in others regulated by the court to which the trustees are liable to account.[3] The English rule in regard to commissions, was cited with approval by Chancellor Kent, in two early cases in New York;[4] but the only States in which it is now followed appear to be Delaware[5] and Illinois.[6]

In England, however, trustees are allowed for their expenses reasonably and properly incurred in the execution of the trust;[7] and it need hardly be added that the same rule exists in the United States.[8] Allowances to trustees are, however, in the discretion of the court; and even the expenses of a trustee will not be reimbursed if they have been incurred unnecessarily, and against the remonstrances of the *cestui que trust*.[9]

145. The position of trustee is one of personal confidence, and he cannot, therefore, delegate his office even to a co-trustee.[10] A trustee may, however, employ a steward, agent or attorney in cases, where it is usual to do so in the ordinary course of business,[11] or a broker.[12] One of several trustees may act as agent for the others.[13]

[1] Perry on Trusts, § 904. Notes to Robinson *v.* Pett, *supra*.

[2] Notes to Robinson *v.* Pett, 2 Lead. Cas. Eq. 206; Perry on Trusts, § 916. See Wistar's Appeal, 4 P. F. Sm. 63.

[3] See Perry on Trusts, § 918, notes, where the authorities and statutes are collected.

[4] Green *v.* Winter, 1 Johns. Ch. R. 37; Manning *v.* Manning, Id. 534.

[5] Egbert *v.* Brooks, 3 Harring. 112; State *v.* Platt, 4 Id. 154.

[6] Constant *v.* Matteson, 22 Ill. 546.

[7] Perry on Trusts, § 910; Hill on Trustees, 574.

[8] Green *v.* Winter, 1 Johns. Ch. 37; Towle *v.* Mack, 2 Verm. 19; McElhenny's Appeal, 10 Wright, (Pa.) 347.

[9] Berryhill's Appeal, 11 Casey, 245; Walker *v.* Walker, 9 Wal. 743.

[10] Hawley *v.* James, 5 Paige, (Ch.) 487; Pearson *v.* Jamison, 1 McLean, C. C. 197.

[11] Ex-parte Belchier, Amb. 219; Hawley *v.* James, 5 Paige, (Ch.) 487; May *v.* Frazee, 4 Lit. 391; Telford *v.* Barney, 1 Iowa, 591; Blight *v.* Schenck, 10 Barr, 285; Lewis *v.* Reid, 11 Ind. 239; Mason *v.* Wait, 4 Scam. 127; Abbott *v.* Rubber Co., 33 Barb. 579; Sinclair *v.* Jackson, 8 Cowen, 543; Webb *v.* Ledsam, 1 K. & J. 385; Leggett *v.* Hunter, 19 N. Y. 445; Bowen *v.* Seeger, 3 W. & S. 222. It seems to be unsettled exactly how far trustees are responsible for money collected by an attorney-at-law, whom they have employed. See Perry on Trusts, § 405.

[12] Speight *v.* Gaunt, 9 App. Cas. 1, where Ex parte Belchier was expressly recognised.

[13] Ex parte Rigby, 19 Ves. 463.

146. Questions have frequently arisen as to the responsibility of a trustee for the acts of his co-trustee, and how far he is liable for money for which he has joined in giving a receipt, but which has been actually paid into the hands of a co-trustee, and lost.

The general principle which governs cases of this description seems to be, that a trustee will be required to act in regard to the trust estate with the same diligence and care which a careful man displays in the conduct of his own affairs,[1] to exercise good faith, and not to connive or in any way aid any bad faith on the part of a co-trustee; but he is not required actively to unite with his co-trustee in everything which is done in the administration of the trust.[2] The rule is, that a trustee is generally not responsible for the conduct of his co-trustee. Upon this subject the leading authorities are the cases of Townley *v.* Sherbourne,[3] and Brice *v.* Stokes.[4] In the first of these cases it was resolved that where lands or leases are conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and afterwards dies or becomes insolvent, his co-trustee shall not be charged or be compelled to answer for the receipt of him so dying or becoming insolvent, unless some fraud or evil dealing appear to have been in them to prejudice their trust. The reason of this decision is, that, trustees being by law joint-tenants, every one is equally entitled to receive the rents. In Brice *v.* Stokes[5] the trustee was, under the particular circumstances of the case, made responsible for money for which he had joined in a receipt, although the amount had not been actually received by him; but the general rule (which has since been acted upon) was laid down by Lord Eldon to be, that at law, where trustees join in a receipt, *primâ facie* all are to be considered as having received the money; but that it is com-

[1] Neff's Appeal, 7 P. F. Sm. 91; Jones's Appeal, 8 W. & S. 150; Davis *v.* Harman, 21 Grat. 200. See Sutton *v.* Wilders, L. R., 12 Eq. 373.

[2] Ochiltree *v.* Wright, 1 Dev. & Bat. Eq. 336; Ray *v.* Doughty, 4 Blackf. 115.

[3] Bridg. 35; 2 Lead. Cas. Eq. 858 (4th Eng ed.).

[4] Brice *v.* Stokes, 11 Ves. 319; 2 Lead. Cas. Eq. 865.

[5] See 2 Lead. Cas. Eq. 865, and notes; Bowers *v.* Seeger, 8 W. & S. 222; Sinclair *v.* Jackson, 8 Cow. 543; Peter *v.* Beverly, 10 Peters, 562; 1 How. 134; Taylor *v.* Benham, 5 How. 233; Perry on Trusts, § 417.

petent to a trustee, and, if he means to exonerate himself from that inference, it is necessary for him to show that the money acknowledged to have been received by all was in fact received by one, and the other joined only for conformity.[1]

But while it is true, as a general rule, that a trustee shall not be liable for the acts or defaults of his co-trustee, yet any fraud or improper dealing or gross negligence on the part of a trustee (as, for example, if he were to stand by and see a breach of trust committed by his co-trustee), will render him responsible.[2] As soon as a trustee is fixed with knowledge that a co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it.[3] And although a trustee (according to the rule laid down by Lord Eldon in Brice *v.* Stokes) may not be liable by joining in a receipt, yet, if (as in that case) the transaction is unnecessary, and he permits his co-trustee to keep and deal with the trust moneys contrary to the trust, he will be charged with any loss which may have occurred.[4]

When a number of trustees are appointed, they constitute (so to speak) but one trustee, and hence in any business of the trust they must all concur;[5] but this rule does not apply to the case of public trusts in which the acts of a majority are binding.[6]

147. When a breach of trust has been committed, the remedy of the injured party is twofold, *first*, by holding the trustees or (in case of their death) their representatives responsible; and, *secondly*, by removal of the trustees.

Trustees who have committed a breach of trust, or their

[1] See Kip *v.* Deniston, 4 Johns. R. 23.

[2] See Mucklow *v.* Fuller, Jac. Ch. 198; Booth *v.* Booth, 1 Beav. 125; Styles *v.* Guy, 1 MacN. & G. 422; Taylor *v.* Roberts, 3 Alab. 86; Worth *v.* McAden, 1 Dev. & Bat. Eq. 199; Latrobe *v.* Tiernan, 2 Maryl. Ch. 474; Monell *v.* Monell, 5 Johns. Ch. 283; Irwin's Appeal, 11 Casey, 294; Ducommun's App., 5 Harris, (Pa.) 268; Clark *v.* Clark, 8 Paige, 153; Mary Evans's Est., 2 Ash. 470

[3] 1 Sug. V. and P. 93 (8th Am. ed.); Wayman *v.* Jones, 4 Maryl. Ch. 506.

[4] Thompson *v.* Finch, 22 Beav. 316; 8 De G. M. & G. 560; Mendes *v.* Guedalla, 2 J. & H. 259; Clark *v.* Clark, 8 Paige, 152; Wayman *v.* Jones, 4 Maryl. Ch. 500; Elmendorf *v.* Lansing, 4 Johns. Ch. 562; Ringgold *v.* Ringgold, 1 H. & Gill, 11; Jones's App., 8 Watts & Serg. 147; Edmonds *v.* Crenshaw, 14 Pet. 166.

[5] Perry on Trusts, § 411.

[6] Id., § 413.

representatives cannot set up the statute of limitations;[1] but the remedy of the *cestui que trust* may be barred by concurrence, acquiescence, or executing a release, providing they are not under any disability, such as infancy, coverture or the like.[2]

Upon proper cause shown, a court of equity will remove a trustee.[3]

A trustee is entitled to come into equity for the purpose of obtaining the advice and assistance of the court in the execution of his trust.[4]

148. A trustee may have his accounts investigated by the court; and on the other hand, he is bound to render proper accounts when summoned to do so.[5] And a trustee who has committed a breach of trust is liable to account to the *cestui que trust* for the amount of the trust funds which have been misapplied, with interest; or for the profits which he has made. In other words, it is a cardinal principle in the management of a trust, that the trustee may lose, but cannot gain.

[1] They can set up the negligence of the *cestui que trust* in asserting his rights. Bright *v.* Legerton, 2 De G., F. & J. 606. See, also, Hunter *v.* Hubbard, 26 Tex. 537; New Market *v.* Smart, 45 N. H. 87; Smith *v.* Drake, 8 C. E. Green, 305.

[2] 2 Lead. Cas. E. (4th Eng. ed.) 916, 919. The disability of coverture does not protect the separate estate of a married woman: Clive *v.* Carew, 1 Johns. & H. 199.

[3] Perry on Trusts; Hill on Trustees, 298 (4th Am. ed.).

[4] Hill on Trustees, 543. See, also, Dill *v.* Wisner, 88 N. Y. 160. The right of the trustee to the advice of the court is said in that case to be the foundation of what is sometimes termed the jurisdiction of the court to interpret wills. This so called jurisdiction to interpret wills, however, is *not* an independent division of equitable jurisdiction. It grows out of several of the heads which are noticed in this book, such as Trusts, Injunctions, Election, Fraud, Creditors' Bills, and others.

[5] Pearse *v.* Green, 1 J. & W. 135; Freeman *v.* Fairlie, 3 Meriv. 24, 42.

CHAPTER VII.

MORTGAGES.

149. The law of Mortgages no longer peculiar to Equity.
150. Nature of a Mortgage; origin of Equity of Redemption.
151. Nature of the Equity of Redemption; limitations.
152. Nature of Mortgagor's title in England; in the United States.
153. Once a mortgage, always a mortgage.
154. Distinction between mortgages and conditional sales.
155. Absolute deed may be shown to be a mortgage.
156. Foreclosure suits.
157. Rights and duties of mortgagor and mortgagee.
158. Tacking.
159. Mortgages to secure future advances.
160. Merger; sometimes prevented in Equity.
161. Equitable mortgages to be considered under Liens.

149. The title which the court of chancery called into being for the purpose of preserving the rights of a *cestui que trust* as against a trustee has been considered, and its origin, its mode of creation, its incidents, and the duties to which it gives rise have been discussed. The next *title* originally recognised solely in courts of equity, which requires notice, is that which grows out of the relation of mortgagor and mortgagee, and it will be desirable to consider in this connection, not only the equitable title itself, but also a few of those rights and duties which are connected with this relation. This consideration, however, must necessarily be brief, for to enter at large into a discussion of all the points which arise out of the interesting subject of mortgages, would be to go somewhat outside of the present jurisdiction of courts of equity.

The subject of mortgages, indeed, is one which, in modern times, might justly fall within the scope of a treatise on common law, rather than of one which professes to deal with the extraordinary jurisdiction of the High Court of Chancery; because the rights of the mortgagor are now so thoroughly recognised in courts of law, that their former precarious condition

has become a matter of history rather than one of practical importance. But this condition of things serves only to justify the remark made by Chancellor Kent, that "the case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and of the homage which these principles have received by their adoption in courts of law."[1]

Besides, while in many States of the Union the peculiarity of the relation of mortgagor and mortgagee has disappeared under the levelling influence of legislative enactments, in others it still remains, while in all of the United States a knowledge of the history of mortgages is necessary to a philosophical understanding of the rules by which they are governed.

150. The jurisdiction of equity upon the subject of mortgages arose principally from two sources:—

First, the harshness with which the common law treated the mortgagor; and second, the inadequacy of relief which that system of jurisprudence afforded to the mortgagee.

As is well known, a mortgage was a conveyance of land sometimes in fee, and sometimes for a less estate, with a stipulation called a clause of defeasance,[2] by which it was provided that in case a certain sum of money were paid by the feoffor to the feoffee, on a day named, the conveyance should be void, and the estate should either, by virtue of the defeasance, revest in the feoffor, or he should be entitled to call upon the feoffee for a reconveyance of the same. The person who borrowed the money and conveyed the estate was called the mortgagor, and the other party to the contract and conveyance was the mortgagee. The term *mortgage* is derived from the *mortuum vadium*, or dead pledge of the civil law; because after the forfeiture was completed by the non-payment of the money, the estate was then *dead* to the mortgagor. Mortgages are classed by Littleton among estates upon condition. The fee vested in the mortgagee from the date of the conveyance, subject to the condition of being defeated by the performance of the stipulation on the part of the mortgagor. On the other hand, if the condition

[1] 4 Kent's Com. 158.

[2] The defeasance may be in a separate instrument: 4 Kent's Com. 41.

were broken, in other words, if the money was not paid, the estate in the mortgagee then became absolute, and the mortgagor lost his property altogether.[1]

As the estate conveyed was very frequently, if not always, greater in value than the debt which the conveyance was intended to secure, the strict common-law construction of conditions broken, and the enforcement of forfeitures thereupon, necessarily occasioned much hardship. If the mortgagor was not prepared on the day to pay the amount due, the estate became absolute in the mortgagee, and no subsequent tender or payment could operate to revest the title in the mortgagor, or entitle him to any relief in a court of law. On one side of Westminster Hall he was entirely without remedy.[2] On the other side, however, the court of chancery interfered for his relief. It was considered in equity that as the mortgage was, in point of fact, only a pledge for a debt, the payment of the debt, together with a penalty for the delay, in other words, interest, ought to entitle the debtor to have his property back again; that is to say, equity recognised the mortgagor's right to redeem. Hence arose that privilege on the part of the mortgagor, which has been so long inseparably connected with mortgages, and which is known as the equity of redemption. It was a right not recognised at common law, but only in chancery, and hence was called

[1] Co. Litt., § 332. "Mortgages, or at least pledges of land in the nature of mortgages, were not unknown to the Anglo-Saxons in England. In at least two ancient charters the transactions are clearly enough defined to show that land was given as security for the payment of money, though as to the manner and form of the transfer and the rights of the parties under it very little can be made out. In one of these cases it appears that the mortgagee was in the possession of the land, and that he doubtless had the use of the land in return for the use of the money loaned by him. Upon the payment of the loan it was his duty to render back the land to the mortgagor, and his failure to do so in this case was the occasion of litigation, commencing in the reign of Edward the Elder, extending through the reigns of Æthelsten, Edmund, Eldred, and Edwy, and finally ending in the reign of Edgar. The tribunal was the Witan, or national assembly, which was also the highest court of law in the kingdom. From another charter, in which reference is made to a mortgage, it seems that the title to the mortgaged land, at some time and in some way not revealed, became vested absolutely in the mortgagee who conveyed away the land." —Jones on Mortgages, § 1.

[2] See remarks of Depue, J., in Shields *v.* Lozear, 34 N. J. Law, 496, cited in Jones on Mortgages § 9.

an "equity;" it was a right to buy back the land pledged, and hence was termed "redemption."

This right of the mortgagor was recognised as early as the reign of Queen Elizabeth.[1]

151. In Roscarrick *v.* Barton[2] it was said that the equity of redemption was a mere *right*, as distinguished from an *estate;* but in the leading case of Casborne *v.* Scarfe,[3] Lord Harkwicke decided that it was an *estate*, "for," said he, "it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seizin." This view of the equity of redemption has been particularly observed in the United States, where a mortgage is looked upon as a mere security for the debt, and the title is considered, for most purposes, as remaining in the mortgagor.[4] In some States, indeed, the mortgage passes no legal title whatever to the mortgagee until foreclosure takes place;[5] while in others the common-law doctrine that the legal title passes to the mortgagee is adhered to, subject (as already stated) to the equitable doctrine that this passage of the legal title is merely by way of security for the debt and that for all

[1] Langford *v.* Barnard, Tothill, 134. See, also, Emmanuel Col. *v.* Evans, 1 Ch. Rep. 18.

[2] 1 Ch. Cas. 217.

[3] Atk. 603; 2 Lead. Cas. Eq. 1035 (4th Eng. ed.).

[4] Timms *v.* Shannon, 19 Maryl. 296; Glass *v.* Ellison, 9 N. H. 69; Catlin *v.* Henton, 9 Wis. 476; 4 Kent's Com. 160; 2 Wash. on Real Prop. 151; Jones on Mortgages, § 11 *et seq.*

[5] Witherell *v.* Wiberg, 4 Sawyer, 235; McMillan *v.* Richards, 9 Cal. 409; Fogarty *v.* Sawyer, 17 Id. 592; Dutton *v.* Warschauer, 21 Cal. 621; Kidd *v.* Temple, 22 Id. 262; Bludworth *v.* Lake, 33 Id. 264; Mack *v.* Wetzlar, 39 Id. 247; Harp *v.* Calahan, 46 Id. 222; Drake *v.* Root, 2 Col. 685; Hall *v.* Tunnell, 1 Houst. 320; Cooch *v.* Gerry, 3 Har. 280; Newbold *v.* Newbold, 1 Del. Ch. 310; Vason *v.* Ball, 55 Georgia, 268; Burnside *v.* Terry, 45 Id. 621; Jackson *v.* Carswell, 34 Id. 279; Fletcher *v.* Holmes, 32 Ind. 497; Francis *v.* Porter, 7 Id. 213; Chuk *v.* Willetts, 2 Kans. 384; Caruthers *v.* Humphrey, 12 Mich. 270; Gorham *v.* Arnold, 22 Id. 247; Hyman *v.* Kelly, 1 Nevada, 179; Whitmore *v.* Shiverick, 3 Id. 288; Waters *v.* Stewart, 1 Caines Cas. 47; Jackson *v.* Willard, 4 Johns. 42; Runyan *v.* Mersereau, 11 Id. 534; Packer *v.* Rochester, &c., R. R. Co., 17 N. Y. 283; Trimm *v.* Marsh, 54 N. Y. 603; Wright *v.* Henderson, 12 Texas, 43; Walker *v.* Johnson, 37 Id. 127; Mann *v.* Falcon, 25 Id. 271; Wood *v.* Trask, 7 Wis. 566.

other purposes the mortgagor is regarded as the owner.[1] In somes States the subject is regulated by statute.[2]

This equity of redemption was, however, limited in point of time. It would have been obviously unjust to allow a mortgagor, or persons claiming under him, an unlimited option to redeem, no matter how many years might have elapsed since the date of forfeiture. The statute of limitations, as to real estate,[3] furnished a convenient standard by which the duration of this right was to be measured; and it was held that after twenty years from the time of forfeiture, the mortgagor's right to redeem was for ever gone.[4]

[1] Duval *v.* McLoskey, 1 Alab. 708; Knox *v.* Easton, 38 Alab. 345; Kannady *v.* McCarron, 18 Ark. 166; Chamberlain *v.* Thompson, 10 Conn. 251; Town of Clinton *v.* Town of Westbrook, 38 Conn. 9; Carrall *v.* Ballance, 26 Ill. 9; Jackson *v.* Warren, 32 Id. 331; Pollock *v.* Maison, 41 Id. 516; Harper *v.* Ely, 70 Id. 581; Stewart *v.* Barrow, 7 Bush, 368; Blaney *v.* Bearce, 2 Maine, 132; Brown *v.* Stewart, 1 Maryl. Ch. 87; Sumwalt *v.* Tucker, 34 Maryl. 89; Annapolis, &c., R. R. Co., *v.* Gantt, 39 Id. 115; Ewer *v.* Hobbs, 5 Met. 1; Howard *v.* Robinson, 5 Cush. 119; Brown *v.* Cram, 1 N. H. 169; Shields *v.* Lozear, 34 N. J. Law, 496; Hemphill *v.* Ross, 66 N. C. 477; State *v.* Ragland, 75 Id. 12; Harkrader *v.* Leiby, 4 Ohio St. 602; Allen *v.* Everly, 24 Ohio St. 97, 114; Simpson's Lessee *v.* Ammons, 1 Binney, 175; Britton's Appeal, 9 Wright, 172; Tryon *v.* Munson, 27 P. F. Sm. 250; Youngman *v.* Elmira, &c,, R. R. Co., Id. 278; Waterman *v.* Matteson, 4 R. Island, 538; Henshaw *v.* Wells, 9 Hump. 568; Vance *v.* Johnson, 10 Id. 214; Hagar *v.* Brainard, 44 Verm. 294. "In Delaware, Mississippi, and Missouri the common law doctrine is so far modified, that until a breach of the condition and possession taken the mortgagor is regarded as the owner of the legal estate not only as against third persons, but as against the mortgagee himself. But upon a forfeiture and entry of the mortgagee, he is regarded as having the legal title for the purpose of enforcing his demand and obtaining satisfaction out of the property."—Jones on Mortgages, § 59 Hall *v.* Tunnell, 1 Houst. 320; Cooch *v.* Gerry, 3 Har. 280; Newbold *v.* Newbold, 1 Del. Ch. 310; Hill *v.* Robertson, 24 Miss. 368; Buckley *v.* Daley, 45 Id. 338; Buck *v.* Payne, 52 Id. 271; Johnson *v.* Houston, 47 Mo. 227; Woods *v.* Hilderbrand, 46 Id. 284; Pease *v.* Pilot Knob Iron Co., 49 Id. 124.

[2] See Jones on Mortgages, § 172 *et seq.*

[3] 21 Jac. I., c. 16.

[4] Anon., 3 Atk. 313; Phillips *v.* Sinclair, 20 Maine, 269; Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Gates *v.* Jacob, 1 B. Mon. 308; Ayers *v.* Waite, 10 Cush. 72; Shew *v.* Bank of Pittsburgh, 16 How. 571; Bates *v.* Conrow, 3 Stockt. 137; Cook *v.* Finkler, 9 Mich. 131; Gunn *v.* Brantley, 21 Alab. 633; Hallesy *v.* Jackson, 66 Ill. 139; McNair *v.* Lot, 34 Mo. 285; Montgomery *v.* Chadwick, 7 Iowa, 114; Crawford *v.* Taylor, 42 Id. 260; Rogan *v.* Walker,

By analogy to the exceptions in the statute, ten years additional were allowed after the removal of the impediments of infancy, coverture, imprisonment or absence beyond the seas.[1]

This equity of redemption existed not only in favor of the mortgagor, but also of other parties claiming under him. Thus the heir, the devisee, or the alienee (even though a volunteer) of the mortgagor, may redeem.[2] So, also, may a subsequent mortgagee,[3] a judgment-creditor,[4] or the crown, or lord of the fee, on forfeiture.[5] A tenant for life, a remainderman, a reversioner, a tenant by the curtesy or by devise, and a jointress may all redeem;[6] and, in general, it may be said that this right exists in favor of any one who has an interest in the land, and would be a loser by foreclosure.[7] But where a party is not

1 Wis. 527; Knowlton *v.* Walker, 13 Id. 264; Bailey *v.* Carter, 7 Ired. Eq. 282; Randall *v.* Bradley, 65 Maine, 43; Hoffman *v.* Harrington, 33 Mich. 392; Hall *v.* Denckla, 28 Ark. 506; 2 Sug. V. & P. 109 (8th Am. ed.).

[1] 1 Lead. Cas. Eq. 1065 (4th Eng. ed.); Jones on Mortgages, § 1114. In England the limitation of the right of redemption is now fixed at twenty years by statute 3 and 4 Wil. IV., c. 27, § 28; unless in the mean time an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given in writing, signed by the mortgagee or the person claiming through him.

[2] Pym *v.* Bowreman, 3 Swanst. 241, n.; Lloyd *v.* Wait, 1 Ph. 61; Lewis *v.* Nangle, 2 Ves. Sr. 431; Rand *v.* Cartright, 1 Ch. Ca. 59. See Beach *v.* Shaw, 57 Ill. 17; Smith *v.* Manning's Exr., 9 Mass. 422; Beach *v.* Cooke, 28 N. Y. 508.

[3] Fell *v.* Brown, 2 Bro. C. C. 276; Bigelow *v.* Willson, 1 Pick. 493; Haines *v.* Beach, 3 Johns. Ch. 460; Scott *v.* Henry, 13 Ark. 112; Kimmell *v.* Willard, 1 Doug., (Mich.) 217; Hill *v.* White, Saxt. 435; Wiley *v.* Ewing, 47 Alab. 418; Beach *v.* Shaw, 57 Ill. 17; Hogden *v.* Guttery, 58 Id. 431; Manning *v.* Markel, 19 Iowa, 103.

[4] Stonehewer *v.* Thompson, 2 Atk. 440; Mildred *v.* Austin, L. R., 8 Eq. 220; Hitt *v.* Holliday, 2 Litt. 332; Dabney *v.* Green, 4 Hen. & Munf. 101; Bigelow *v.* Wilson, 1 Pick. 485; Bank *v.* Rosevelt, 9 Cow. 409.

[5] Att. Gen. *v.* Crofts, 4 Bro. P. C. 136; Downe *v.* Morris, 3 Hare, 394.

[6] Ravald *v.* Russell, 1 You. 9; Raffety *v.* King, 1 Keen, 618; Aynsly *v.* Reed, 1 Dick. 249; Palmes *v.* Danby, Prec. Ch, 137; Jones *v.* Meredith, Bunb. 347; Howard *v.* Harris, 1 Vern. 33; Lamson *v.* Drake, 105 Mass. 504; Opdyke *v.* Bartles, 3 Stockt. 133; McArthur *v.* Franklin, 16 Ohio St. 193; Denton *v.* Nanny, 8 Barb. 618; Henry's Case, 4 Cush. 257; Davis *v.* Wetherill, 13 Allen, 60.

[7] Pearce *v.* Morris, L. R., 5 Ch. 229; Bogut *v.* Coburn, 27 Barb. 330; Scott *v.* Henry, 13 Ark. 112; Platt *v.* Square, 12 Met. 494; Farnum *v.* Metcalf, 8 Cush. 46.

affected by the mortgage, there is no occasion for redeeming, and he is not allowed to do so.[1]

And this right may, of course, be exercised not only against the mortgagee, but against any person claiming under him.

152. The nature of the mortgagor's title has been the subject of some discussion both in England and in the United States. In the case of a mortgage there was an equitable title given by the court of chancery distinct from the co-existing legal title; and in this respect, therefore, the relation of mortgagor and mortgagee resembled that of trustee and *cestui que trust;* but while the two relations had this characteristic in common, they were by no means identical.[2] It has been truly said that the relation of mortgagor and mortgagee is one which is perfectly anomalous and *sui generis;*[3] and that while the relation of vendor and purchaser, of principal and bailiff, of landlord and tenant, of debtor and creditor, and of trustee and *cestui que trust*, have been used to describe the relation of mortgagor and mortgagee, yet by the names of mortgagor and mortgagee alone can that relation be properly characterized.

It had been decided in England that the equity of redemption of an estate in fee-simple, prior to the statute of 3 & 4 Wil. IV., c. 104, was an equitable and not a legal asset;[4] but this did not necessarily determine the equitable nature of the estate itself; for it was pointed out by Vice-Chancellor Kindersley, in Cook *v.* Gregson,[5] that the term equitable assets referred not to the nature of the property in the hands of the executor, but to the remedy by which the assets could be reached by the creditors of the decedent, And it was decided, in that case,[6] that the equity of redemption of a sum of money charged on land was legal assets in the hands of the executor—for he could recover it merely *virtute officii* as executor, which was said to be the test.

[1] Moore *v.* Beasom, 44 N. H. 215; Brewer *v.* Hyndman, 18 Id. 9; Smith *v.* Austin, 9 Mich. 465; Boarman *v.* Catlett, 21 Miss. 149; Purvis *v.* Brown, 4 Ired. Eq. 413. See further upon the subject, Venderhaise *v.* Hughes, 2 Beas. 410; Ballard *v.* Jones, 6 Humph. 455; Meehan *v.* Forrester, 52 N. Y. 277; Whittick *v.* Kane, 1 Paige, 202; Dunlap *v.* Wilson, 32 Ill. 517; Rogers *v.* Meyers, 68 Id. 92.

[2] 1 Spence Eq. 432.

[3] Cholmondeley *v.* Clinton, 2 Jac. & Wal. 182, 183.

[4] It is now made a legal asset by that statute.

[5] 3 Drewry, 547.

[6] Id.

But that the estate of the mortgagor is to be regarded in England as an equitable and not a legal title, is evident from the circumstance that a second mortgage of the same estate is always considered as the transfer of an equitable and not of a legal title, and therefore is to be subject to the rules by which the assignments of equitable interests are governed.[1]

In the United States, however, the nature of the mortgagor's interest is of a legal rather than an equitable character, at all events so far as regards third persons. The mortgagor may bring an action at law to recover the land; his estate is liable to dower, and may be taken in execution for his debts.[2]

But as between the mortgagor and mortgagee the legal title passes by the mortgage, and the mortgagee has a right to recover in ejectment.[3] This is the English rule, and the same doctrine has been adopted in many of the United States. In others, however, the mortgage is considered as creating a lien merely, and giving no title upon which an ejectment can be sustained.[4]

Both in England and in this country the interest of the mortgagee is considered as personal property, and goes to the executor and not to the heir.[5]

[1] See *post*, Chap. VIII., Assignments. Notes to Thornbrough *v.* Baker, 2 Lead. Cas. Eq. 1030 (4th Eng. ed.); and to Marsh *v* Lee, 1 Id. 611.

[2] American note to Thornbrough *v.* Baker, 3 Lead. Cas. Eq. 647; Brobst *v.* Brock, 10 Wallace, 529; Hutchins *v.* King, 1 Wallace, 58; Wilkins *v.* French, 20 Maine, 111; Jackson *v.* Willard, 4 Johns. 41; Ellison *v.* Daniels, 11 N. Hamp. 274; Hitchcock *v.* Harrington, 6 Johns. 295; Norwich *v.* Hubbard, 22 Conn. 587; Carpenter *v.* Bowen, 42 Miss. 28; Woods *v.* Hilderbrand, 46 Missouri, 284; Hale *v.* Horne, 21 Grat. 321; Williams *v.* Beard, 1 S. Carolina (N. S.) 324; Jackson *v.* Lodge, 36 Cal. 28; Buckley *v.* Daley, 45 Miss. 338; White *v.* Rittenmyer, 30 Iowa, 268; Gorham *v.* Arnold, 22 Mich. 250; 2 Wash. on Real Prop. 155.

[3] Unless it appears by a stipulation in the mortgage or otherwise that it is the intention of the parties that the mortgagor should remain in possession. Youngman *v.* Elmira Railroad Co., 15 P. F. Sm. 285; Soper *v.* Guernsey, 21 Id. 224; Wales *v.* Mellen, 1 Gray, 512; Norton *v.* Webb, 36 Maine, 270; Brown *v.* Leach, Id. 39. As to the rights of the assignee of a mortgage, see Cottrell *v.* Adams, 2 Bissell, 350; Kibbe *v.* Dunn, 5 Id. 233.

[4] 2 Washburn on Real Prop. 100. See, also, Hogsett *v.* Ellis, 17 Mich. 351; Mann's Ex'rx. *v.* Falcon, 25 Tex. 271.

[5] Trimm *v.* Marsh, 54 N. Y. 623; Thornbrough *v.* Baker, 1 Ch. Ca. 283; 2 Lead. Cas. Eq. 817. A conveyance of the mortgaged premises by the mortgagee, without assigning the debt, passes no estate. Johnson *v.* Cornett, 29 Ind. 59; Hubbard *v.* Harrison, 38

153. The equity of redemption would have rested upon a very slender and precarious foundation, if it could have been waived, surrendered or bargained away by the mortgagor at the time of the creation of the mortgage; because the same necessity which drove him into the position of borrower, would also have inevitably compelled him to submit to any terms or stipulations, however harsh, which the lender of the money chose to insist upon. The right to redeem would therefore have been given up, in favor of the mortgagee, and thus have been rendered of little practical value, if equity had not again interfered for the protection of the debtor. It was, consequently, at an early date determined, and it is a settled and fundamental doctrine in the law of mortgages, that the mortgagor cannot by any stipulation or agreement made in the mortgage instrument, or at the date of its execution, waive or surrender his right to redeem within the twenty years.[1] No matter how rigidly he may attempt to bind himself, and no matter how stringent may be the contract by which the equity of redemption is to be given up, and the estate is to become absolutely the property of the mortgagee in the event of a forfeiture, a court of chancery will utterly disregard any such agreement, and will hold the mortgagor still capable of exercising this inalienable right of redeeming his property upon payment of the principal and interest of the mortgage-debt.

So deeply rooted is this doctrine, that it has taken the shape of a maxim, and the immutable character of the mortgagor's right is expressed in the emphatic phrase, "once a mortgage, always a mortgage."[2] A man may, of course, sell his equity of redemption the day after the mortgage is created, if he chooses so to do;[3] but he cannot, by any form of language, part with it

Ind. 341; 4 Kent. Com. 194. The interest of the mortgagee is a chose in action within the meaning of the judiciary act. Hill *v.* Winne, 1 Bissell, 277; Sheldon *v.* Sill, 8 Howard, 441; Smith *v.* Kernochen, 7 Id. 198.

[1] Howard *v.* Harris, 1 Vern. 190 (2 Lead. Cas. Eq. 869), decided in 1683. See, also, East India Co. *v.* Atkyns, Com. Rep. 349; Jason *v.* Eyres, 2 Ch. Ca. 33; Spurgeon *v.* Collier, 1 Eden. 55; Goodman *v.* Grierson, 2 Ball & B. 278; Cowdry *v.* Day, 1 Giff. 315.

[2] See Newcomb *v.* Bonham, 1 Vern. 7; Price *v.* Perrie, 2 Freem. 258; Willett *v.* Winnell, 1 Vern. 488; Bowen *v.* Edwards, 1 Rep. in Ch. 222; Jones on Mortgages, § 7.

[3] Trull *v.* Skinner, 17 Pick. 213; Remsen *v.* Hay, 2 Edw. Ch. 535; Wyn

in favor of the mortgagee at the instant of the creation of the mortgage.[1]

Moreover, equity does not allow the privileges of a mortgagor to be clogged by *any* stipulations which are inconsistent with his character as mortgagor. Thus agreements that if interest is not paid at the end of the year it is to be converted into principal;[2] that a commission would be paid in case the mortgage should be paid off;[3] that the mortgagee shall be receiver of the rents with a commission,[4] and the like, have been held invalid.[5]

154. The care which equity takes to call into being and preserve the right of redemption is shown in the tendency which exists in courts of chancery (and in courts of law where equitable doctrines are recognised) to construe alleged conditional sales to be, in fact, mortgages. A sale coupled with a stipulation or condition that the vendor shall be at liberty to buy back the property within a certain time, is not forbidden by law, and when such a contract is made the parties must abide by it, and the original vendor has no right to insist upon a resale to himself at any day after the stipulated time.[6] But when the transaction is in substance a security for a debt, and when there is sufficient evidence to show that *that* was the real intention of the parties, it is obvious that the nature of the con-

koop *v.* Cowing, 21 Ill. 570; Hicks *v.* Hicks, 5 G. & J. 75. Although such a transaction is closely scrutinized in equity, and its fairness must distinctly appear; Holridge *v.* Gillespie, 2 Johns. Ch. 34; Russell *v.* Southard, 12 Howard, 154; Villa *v.* Rodriguez, 12 Wallace, 323; Webb *v.* Rorke, 2 Sch. & Lef. 673. See, also, Brown *v.* Gaffney, 28 Ill. 150; Baugher *v.* Merryman, 32 Maryl. 185; Dougherty *v.* Colgan, 6 Gill & J. 275.

[1] Johnston *v.* Gray, 16 S. & R. 365; Clark *v.* Henry, 2 Cow. 324; Stover *v.* Bounds, 1 Ohio St. 107; Pritchard *v.* Elton, 38 Conn. 434; McNees *v.* Swaney, 50 Mo. 391; Skinner *v.* Miller, 5 Little, 84; Hiester *v.* Maderia, 3 W. & S. 388; Wilson *v.* Drumrite, 21 Mo. 325; Rogan *v.* Walker, 1 Wis. 527; Henry *v.* Clark, 7 Johns. Ch. 40; s. c. 2 Cow. 324; Jaques *v.* Weeks, 2 Watts, 261, 277; Woods *v.* Wallace, 10 Harris, 171; Robinson *v.* Farelly, 16 Alab. 472; Vanderhaise *v.* Hugues, 7 Beas. 244, 411; Pierce *v.* Robinson, 13 Cal. 125; Rankin *v.* Mortimere, 7 Watts, 372; Clark *v.* Condit, 3 C. E. Green, 358. See Glendenning *v.* Johnston, 33 Wis. 347, for an exceptional case. Notes to Thornbrough *v.* Baker, *supra;* 2 Wash. Real Prop. 67.

[2] Chambers *v.* Goldwin, 9 Ves. 271.

[3] Chappel *v.* Maham, 5 J. R. Eq. 225.

[4] Id.

[5] Note to Thornbrough *v.* Baker, *ut sup.*

[6] See Buse *v.* Page, 32 Minn. 111. Where there is simply a deed with a bond for reconveyance in payment of a certain sum, the transaction will be considered *prima facie* a conditional sale not a mortgage: Id.

tract is that of a mortgage, and not of a sale with the privilege of buying back.[1] The mere fact, therefore, that the transaction has assumed the shape of a conditional sale will not be allowed to alter the rights of the parties, or deprive the party, who is in fact, though perhaps not in name, a mortgagor, of his equity of redemption. The difficulty in most cases is to ascertain what the actual nature of the transaction was intended by the parties to be. Each case must, of course, to a great extent, depend upon the circumstances peculiar to itself: but there are certain *indicia* of intention which frequently occur, and which when they do exist are always looked to. Among these are the sufficiency or insufficiency of the price paid; whether or not existing securities or evidences of indebtedness were given up or cancelled; whether there was any obligation to repay the purchase-money; and whether the grantee entered into immediate possession of the premises.[2]

Whatever difficulty there may be in determining the nature of any particular transaction, two general rules seem to be established by the authorities: first, that if the agreement is in substance a mortgage, its form cannot deprive the debtor of his equity of redemption; and secondly, that courts will lean very strongly towards construing the agreement to be a mortgage rather than a conditional sale.[3]

[1] See Danzeisen's Appeal, 23 P. F. Sm. 65; Huoncker *v.* Merkey, 102 Pa. St. 465; McIntier *v.* Shaw, 6 Allen, 83; Sweet *v.* Parker, 7 C. E. Green, 453; Clark *v.* Lyon, 46 Georgia, 202; Wilson *v.* Patrick, 34 Ia. 362; Moore *v.* Wade, 8 Kans. 381; Hunter *v.* Hatch, 45 Ill. 178; Church *v.* Cole, 36 Ind. 35; Davis *v.* Clay, 2 Missouri, 161; Phœnix *v.* Gardner, 13 Minn. 430; Yates *v.* Yates, 21 Wis. 473; Cotterell *v.* Long, 20 Ohio, 464; Bennett *v.* Union Bank, 5 Humph. 612.

[2] See note to the case of Haines *v.* Thomson, 70 Pa. St. R. 434. See, also, Bridges *v.* Linder, 60 Ia. 190.

[3] Cornell *v.* Hall, 22 Mich. 377; Watkins *v.* Gregory, 6 Blackf. 113; Peterson *v.* Clark, 15 Johns. 205; Rice *v.* Rice, 4 Pick. 349; Hughes *v.* Sheaff, 19 Iowa, 342; Wilson *v.* Patrick, 34 Id. 370; Weathersly *v.* Weathersly, 40 Miss. 469; Wing *v.* Cooper, 37 Verm. 179. See, also, Kerr *v.* Gilmore, 6 Watts, 405; Heister *v.* Madeira, 3 Watts & Serg. 384; Ruffler *v.* Womack, 30 Tex. 332; Robinson *v.* Willoughby, 65 N. C. 520; Carpenter *v.* Snelling, 97 Mass. 452; Flagg *v.* Mann, 2 Sumn. 486; Colwell *v.* Woods, 3 Watts, 188; Kunkle *v.* Wolfsberger, 6 Id. 126; Halsey *v.* Treville, Id. 407; Rankin *v.* Mortimere, 7 Id. 372; Todd *v.* Campbell, 8 Casey, 250; Kellum *v.* Smith, 9 Id. 158; Houser *v.* Lamont, 5 P. F. Sm. 311; Halo *v.* Shick, 7 Id. 319; Spering's Appeal, 10 Id. 199; McClurkan *v.* Thompson, 19 P. F. Sm.

Where, however, it plainly appears that a conditional sale was intended, the parties will be held to their bargain.[1]

155. In favor of the equity of redemption a court of chancery will allow a deed, absolute on its face, to be shown to be a mortgage. This principle is recognised in nearly all, if not all, the States of the Union (except, of course, in those in which the law has been changed by statute,)[2] and is settled by a host of decisions.[3] Parol evidence is admissible in such cases in most of the States of the Union, for the statute of frauds is not applicable,[4] but it must be very clear.[5]

The ground upon which this doctrine is placed by Chancellor Kent is that of fraud, accident or mistake; and according to that view, where neither of these elements exists, the absolute deed cannot be shown to be a mortgage.[6] But it has been

305; Sweetzer's Appeal, 21 P. F. Sm. 264. See, also, Payne *v.* Patterson, 27 Id. 134, for a case which is to be distinguished from the above. Notes to Thornbrough *v.* Baker, 2 Lead. Cas. Eq. 628 (3d Am. ed.); 2 Wash. on Real Prop. 62, 64.

[1] Conway's Exrs. *v.* Alexander, 7 Cranch, 218; Haines *v.* Thompson, 20 P. F. Smith, 434; Pearson *v.* Seay, 35 Alab. 612. See also, Pitts *v.* Cable, 44 Ill. 103; Carr *v.* Rising, 62 Id. 14; Turner *v.* Ker, 44 Wis. 429; Cornell *v.* Hall, 22 Mich. 377; Henley *v.* Houghtaling, 41 Cal. 22; Hanford *v.* Blessing, 80 Ill. 188. See upon the general subject Jones on Mortgages, Chap. VIII.

[2] See, in Pennsylvania, the Act of June 8th, 1881 (Pamph. L. 84), and Hartley's Appeal, 103 Pa. St. 23.

[3] Among the more recent authorities upon this point are Villa *v.* Rodriguez, 12 Wallace, 323; Sweet *v.* Parker, 7 C. E. Green, 453; Horn *v.* Keteltas, 46 New York, 605; Odenbaugh *v.* Bradford, 17 P. F. Smith, 96; Sweetzer's Appeal, 21 Id. 273; French *v.* Burns, 35 Connec. 359; Wing *v.* Cooper, 37 Verm. 179; Shays *v.* Norton, 48 Ill. 100; Klock *v.* Walter, 70 Ill. 416; Wilson *v.* McDowell, 78 Id. 514; Sutphen *v.* Cushman, 35 Id. 186; Campbell *v.* Dearborn, 109 Mass. 130; Pierce *v.* Robinson, 13 Cal. 116; Kuhn *v.* Rumpp, 46 Cal. 299; Heath *v.* Williams, 30 Ind. 495; Roberts *v.* McMahan, 4 Greene, (Ia.) 34; Zuver *v.* Lyons, 40 Id. 510; Skinner *v.* Miller, 5 Litt. 86; Moore *v.* Wade, 8 Kans. 380; Swetland *v.* Swetland, 3 Mich. 482; Emerson *v.* Atwater, 7 Id. 12; Weide *v.* Gehl, 21 Minn. 449; Jones *v.* Blake, 33 Minn. 362; O'Neill *v.* Capelle, 62 Mo. 202; Sweet *v.* Parker, 22 N. J. Eq. 453; Carr *v.* Carr, 52 N. Y. 251; Brown *v.* Clifford, 7 Lans. 46; Fessler's Appeal, 25 P. F. Sm. 483; Nichols *v.* Cabe, 3 Head, 93; Wilcox *v.* Bates, 26 Wis. 465.

[4] Laffitt's Admr. *v.* Rynd, 19 P. F. Sm. 387; Ballentine *v.* White, 27 Id. 25; Sanders *v.* Beck, 92 Ind. 49.

[5] See 2 Washburn on Real Property, 50 *et seq.*; Lindauer *v.* Cummings, 57 Ill. 200; McGinity *v.* McGinity, 13 P. F. Sm. 45; Plumer *v.* Guthrie, 26 Id. 455; Campbell *v.* Dearborn, 109 Mass. 135.

[6] See Stevens *v.* Cooper, 1 Johns. Ch. 245; following the rule in Irnham *v.* Child, 1 Bro. Ch. C. 92.

decided in the Supreme Court of the United States, that where a deed is *intended* to operate as a mortgage, it would be a fraudulent act on the part of the grantee to insist upon its being absolute, and on that ground the grantor would be entitled to relief;[1] and this is now the rule in New York,[2] and is the more generally accepted doctrine in this country.[3]

156. Equity, having thus interposed so justly and so decidedly in favor of the mortgagor, was now ready to lend its assistance to the mortgagee, who, in his turn, might have been subjected to great inconveniences if the court of chancery had not come to his relief. Because, for a man to hold possession of an estate, and yet to be all the time at the risk of being deprived of the enjoyment of it at the option of the debtor, and whenever it might suit the convenience of the latter to pay the debt, was, it is plain, to hold land by a very precarious and uncertain tenure. The mortgagee could not improve beyond the necessary repairs, without being liable to have the improved property taken away from him at any moment.[4]

It was, therefore, decided in equity, that a bill would be entertained for the purpose of foreclosing (as it was termed) the mortgagor's equity of redemption. By the decree made under this bill, a new day was fixed, on or before which the debtor was required to pay the debt, and if he failed to meet his obligation at the new date thus specified, his right to redeem was for ever foreclosed, and his estate absolutely forfeited to the mortgagee.

It required one step more to render the remedy entirely fair to both parties. This was effected in England by the statute 15 & 16 Vic., c. 86, under which a sale of the mortgaged premises can be made in a foreclosure suit. So much of the proceeds as is necessary to pay to the mortgagee his debt, interest and costs is devoted to that purpose, and the balance is handed to the mortgagor. The mortgagee's remedy in many of the United States is prescribed and regulated by statute, and in

[1] Babcock *v.* Wyman, 19 How. 289; Morgan *v.* Shinn, 15 Wal. 105; Russell *v.* Southard, 12 How. 139. See Adams *v.* Adams, 51 Conn. 544; 2 Wash. Real Prop. 58, and the American note to Woollam *v.* Hearne, 2 Lead. Cas. Eq. 673 *et seq.*, where the subject is discussed at length.

[2] Brown *v.* Clifford, 7 Lans. (N. Y.) 46.

[3] See Jones on Mortgages, § 322.

[4] See *post*, § 157.

some of them a foreclosure is accomplished by petition or *scire facias*. In others, the proceedings by bill in equity are retained, being in some cases, however, slightly modified by statute;[1] and in nearly all of them the proceedings in foreclosure result in a sale of the mortgaged premises.

157. During the existence of the mortgage there are certain other rights of the parties which have not yet been noticed, but which ought to be spoken of.

And, in the first place, as to the mortgagor, it must be remembered that if he is suffered to remain in possession, he remains in as owner, and is not accountable for the rents and profits,[2] and they are liable for his debts. As long as he is permitted by the mortgagee to retain the actual enjoyment of the estate, his rights of ownership are the same as those of any other holder of a fee; subject, however, to this qualification—he cannot commit waste.[3]

If a mortgagor is wasting the land so as to affect the security of the mortgagee, chancery will interfere on a bill filed by the latter for the purpose of restraining this inequitable use of his estate on the part of the mortgagor.[4]

On the other hand, a court of equity will not only restrain the *mortgagee* when in possession from committing waste, but will also hold him accountable for the rents and profits. His possession not being a tortious one, he is, of course, not considered liable for all that he *might* have received—he is only answerable for all that he has *actually* received, or could have collected with reasonable diligence. He is not to be held to the strictest accountability on the one hand, and, on the other, he is not permitted to be entirely negligent or wasteful in the management of the estate. And he is responsible to the same extent, when

[1] It would be impossible to notice the statutory provisions in the different States as to the remedies of the mortgagee. Reference may be had to the synopsis of the statutes in the Introduction, *ante*, p. 23 *et seq.*; to Washburn on Real Prop., Book I., Ch. XVI., Sec. X.; and to Mr. Jones's recent valuable treatise on Mortgages, Chap. XXVII. *et seq.*

[2] See Galveston Railroad Co. *v.* Cowdrey, 11 Wal. 459; Gillman *v.* Ill. & Miss. Tel. Co., 1 Otto, 617; American Bridge Co., *v.* Heidelbach, 4 Otto, 800; Teal *v.* Walker, 111 U. S. 242.

[3] 2 Spence Eq. 648; 1 Wash. on Real Prop., Book I., Ch., XVI., Sec. V.; Jones on Mortgages, § 670 *et seq.*

[4] Jones on Mortgages, § 684 *et seq.*

he has assigned the mortgage; because it is considered his duty to see that none but a proper person is allowed to enter into possession of the land.[1]

158. One of the consequences of the fact that a mortgage is in form a conveyance of the legal title from the mortgagor to the mortgagee, was that a second mortgagee could acquire only an equitable title to the mortgaged property; in other words, he was merely an equitable encumbrancer. Now, in case an equitable encumbrancer gets in the legal title, then, unless there is some countervailing equity to deprive him of this advantage, his position will be superior to that of his fellow encumbrancers, in obedience to the equitable maxim that where equities are equal, the law shall prevail. This is the origin of the doctrine of *tacking*—which exists in the law of mortgages in England, but which has rarely been adopted in the United States. The doctrine may be best explained by an example. Suppose there are three mortgages, all of different date. The mortgagee first in point of time will hold the legal title, the other two will be simply equitable encumbrancers. Now, if the third mortgagee buys in the first mortgage, so as to become the owner of the legal title, he has a right to tack the two mortgages together, and realize the whole amount due on both, prior to the second mortgagee, whose security is thus, as it were, squeezed out between the first and third mortgage.[2] But this can only be allowed in

[1] Upon the subject of the extent of the accountability of a mortgagee in possession, and the manner of taking the account, see Sanders *v.* Wilson, 34 Verm. 321; Miller *v.* Lincoln, 6 Gray, 556; Ruckman *v.* Astor, 9 Paige, 517; Bell *v.* The Mayor of New York, 10 Paige, 73; Hubbell *v.* Moulson, 53 N. Y. 225; Strong *v.* Blanchard, 4 Allen, 538; Richardson *v.* Wallis, 5 Id. 78; Hubbard *v.* Shaw, 12 Id. 120; Boston Iron Co. *v.* King, 2 Cush. 400; Shaeffer *v.* Chambers, 2 Hals. Ch. 548; Rawlings *v.* Stewart, 1 Bland, 22, note; Breckinridge *v.* Brooks, 2 A. K. Marsh, 339; Powell *v.* Williams, 14 Alab. 476; Harper's Appeal, 14 P.F. Sm. 315; Anthony *v.* Rogers, 20 Mo. 281; Gillman *v.* Wills, 66 Me. 273; Barnard *v.* Jennison, 27 Mich. 230; Montgomery *v.* Chadwick, 7 Iowa, 114; Milliken *v.* Bailey, 61 Maine, 316; Moore *v.* Titman, 44 Ill. 367; Strang *v.* Allen, Id. 428; Harper *v.* Ely, 70 Id. 581; 2 Wash. on Real Prop. 204 to 216; Jones on Mortgages, § 1114. The accountability of a mortgagee for rents which he *might* have received may be modified by the fact that he supposed himself to have an absolute title: Parkinson *v.* Hanbury, L. R., 2 H. L. Cas. 1; Cookes *v.* Culbertson, 9 Nev. 199.

[2] See notes to Marsh *v.* Lee, 1 Lead. Cas. Eq. 615, (4th Eng. ed.) where this subject is discussed at length.

those cases in which the third mortgagee had no notice of the existence of the second mortgage, at the time he took his mortgage. If he became mortgagee with notice, *at the time*, of the second mortgage, he will not, under these circumstances, be allowed to protect himself by getting in the first mortgage to the prejudice of the second mortgagee.[1] But notice of the existence of the second mortgage, *after* he has advanced the money, cannot then deprive him of the right to buy in the legal title, and protect himself thereby.[2] A junior encumbrancer, if he finds that he is likely to be postponed to a prior lien, of which he had no notice when he became mortgagee, may protect himself by getting in the legal title, and using it (as has been said) as a plank in a shipwreck.[3]

So, also, if a mortgagee lends a further sum on another mortgage, he will be allowed to tack the last mortgage to the first, and cut out a second encumbrancer.

The right to tack does not exist in favor of judgment-creditors, or of any one except those who have advanced their money on the credit of the land. A first mortgagee may, however, tack a judgment to his mortgage.[4]

159. The doctrine of tacking (which is an extremely harsh and inequitable one) does not exist to any extent in the United States.[5] A rule apparently analogous may, however, be found

[1] Id. 621.

[2] 1 Lead. Cas. Eq. 616.

[3] By Lord Hale in Marsh *v.* Lee, *supra.*

[4] Notes to Marsh *v.* Lee, *supra.* Somewhat similar to the doctrine of tacking is that of consolidation of mortgages, by which a mortgagee, when tendered the sum due, has a right to insist upon the mortgagor, at the same time, redeeming a debt secured on another estate, or in other words, to say to him "pay off both debts, or you shall not redeem one." This doctrine is, however, a doubtful one, and will not be encouraged or extended. See Vint *v.* Paget, 2 DeG. & J. 611; Tassell *v.* Smith, Id. 713; Baker *v.* Gray, L. R., 1 C. D. 491; Dorrow *v.* Kelly, 1 Dallas. 153; Anderson *v.* Neff, 11 Serg. & Rawle, 208, 223; Thomas's Appeal, 6 Casey, 378. In Connecticut the doctrine is recognised. See Chamberlain *v.* Thompson, 10 Conn. 251; Phelps *v.* Ellsworth, 3 Day, 397; Rowan *v.* The Sharp's Rifle Man. Co., 29 Conn. 282, 324. See, also, Lamson *v.* Sutherland, 13 Verm. 309; Walling *v.* Aiken, 1 McMullan, Eq. 2; Lee *v.* Stone, 5 Gill & J. 1.

[5] See 4 Kent's Com. 178, 179; 2 Sug. V. and P. 500, (8th Am. ed.) notes; Parkist *v.* Alexander, 1 Johns. Ch. 399; Green *v.* U. S. Bank, 1 Cai. Cas. in Error, 112.

in those cases where a mortgage is given to secure future advances, and where the mortgagee is allowed to recover sums subsequently advanced, as against a *mesne* mortgagee.

The general definition of a mortgage given above, supposes that the debt intended to be secured was cotemporaneous with, or prior to, the mortgage. Mortgages, however, are sometimes given for the purpose of securing advances to be made in the future;[1] and when this is the case questions of no little interest and importance arise. A leading authority upon the general subject, in England, is the case of Brace *v.* The Duchess of Marlborough.[2] It was there held (*inter alia*) that "if a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a *mesne* mortgagee till both the mortgage and statute or judgment are paid;" and it has been decided that *a fortiori* is this the case, if the first mortgagee lends the additional sum on a mortgage.[3] But this rule is subject to the qualification, also laid down in Brace *v.* The Duchess of Marlborough, that the party making the subsequent advance must have had *no notice* of the second mortgage; for being without notice is his sole equity.[4] It has, moreover, been held that even if the first mortgage is given to secure a sum and *further advances*, yet if the first mortgagee made such further advances after notice of a *mesne* incumbrance, he will not be entitled to priority in respect of the same.[5] And this is the rule even although the second mortgagee had notice of the nature of the first mortgage.[6]

In the United States it has been established law for many years that a mortgage may be given for future advances—for debts to be contracted, as well as for those already due.[7]

[1] Lyle *v.* Ducomb, 5 Binn. 585; Irwin *v.* Tabb, 17 S. & R. 419; Garber *v.* Henry, 6 Watts, 57; Maffitt's Adm'r. *v.* Rynd, 19 P. F. Sm. 387.

[2] 2 P. Wms. 491.

[3] Morret *v.* Parke, 2 Atk. 252.

[4] 1 L. Ca. Eq. 621; Marsh *v.* Lee, n.

[5] Shaw *v.* Neale, 20 Beav. 157; 6 H. L. Cas. 581; Hopkinson *v.* Rolt, 9 H. L. Cas. 514; Bradford Banking Co. *v.* Briggs, 12 App. Cas. 36. These cases overruled the old case of Gordon *v.* Graham, 2 Eq. Cas. Ab. 598; which was however, erroneously reported, the decision being, in fact, the other way. In Maryland, the case of Gordon *v.* Graham, as reported, has been followed; Wilson *v.* Russell, 14 Md. 495.

[6] Shaw *v.* Neale; Hopkinson *v.* Rolt.

[7] United States *v.* Hooe, 3 Cranch, 89; Shirras *v.* Craig, 7 Cranch, 34; Lawrence *v.* Tucker, 23 How. 14; Ripley *v.* Harris, 3 Biss. 201; Kansas Valley Bank *v.* Rowell, 2 Dillon, 371;

The future advances, however, to be protected, must be made without notice of the intervening encumbrance.[1] And it has been held that the recording of the intervening encumbrance is sufficient notice.[2] But where advances are made in pursuance of a binding agreement, the party making them will be protected.[3]

It must be remembered that when the subsequent advances are not made by the first mortgagee, in pursuance of the terms of the first mortgage, but by virtue of an independent and subsequent security, the only thing which will protect him in such a case will be the doctrine of tacking, which (as has been already stated) is not generally recognised throughout the United States.

The equity of redemption being considered in equity as an *estate*, the interest of the mortgagee is in the eye of equity personalty, and passes to the executor, and not to the heir. A transfer of the debt, secured by a mortgage, will entitle the assignee to the benefits of the mortgage security; and the payment of the debt will operate to revest an absolute title in the mortgagor, without the necessity of any reconveyance.[4]

160. In dealing with the two titles of the mortgagor and mortgagee, equity will sometimes interfere for the purpose of preventing the application of the doctrine of merger, by which

Allen *v.* Lathrop, 46 Georgia, 133; Brackett *v.* Sears, 15 Mich. 244; Appeal of Bank of Commerce, 8 Wright, (Pa.) 423; Taylor *v.* Cornelius, 10 P. F. Sm. 187; Goddard *v.* Sawyer, 9 Allen, 78; Johnson *v.* Richardson, 38 N. Hamp. 353; Seymour *v.* Darrow, 31 Verm. 122; Crane *v.* Deming, 7 Conn. 387; Joslyn *v.* Wyman, 5 Allen, 62; Goddard *v.* Lawyer, 9 Id. 78; Bank of Utica *v.* Finch, 3 Barb. Ch. 293; Bell *v.* Fleming, 1 Beas. 13, 490; Ladue *v.* The Railroad Co., 13 Mich. 380; Tully *v.* Harlow, 35 Cal. 302; Foster *v.* Reynolds, 38 Miss. 553; Moroney's Appeal, 12 Harris, (Pa.) 372; Farnum *v.* Burnett, 6 C. E. Green, 87; Witczinski *v.* Everman, 51 Miss. 841; Note to Marsh *v.* Lee, 1 Lead. Cas Eq. 606. Though in New Hampshire by statute, the rule is the other way. New Hampshire Bank *v.* Willard, 10 N. H. 210; Johnson *v.* Richardson, 38 Id. 355.

[1] Brinkerhoff *v.* Marvin, 5 Johnson Ch. 320; Shirras *v.* Caig, 7 Cranch, 45; 1 Lead Cas. Eq. 608.

[2] Spader *v.* Lawler, 17 Ohio, 371; though see Shirras *v.* Caig, 7 Cranch, 45.

[3] Crane *v.* Denning, 7 Conn. 387; Moroney's Appeal, 12 Harris, 372; Farnum *v.* Burnett, 6 C. E. Green, 87; 1 Lead. Cas. Eq. 608. See Washburn on Real Prop. 146.

[4] 4 Kent's Com. 194, and notes; Williams on Real Prop. 391.

the interests of the owner of the land might be injuriously affected. It is well settled that where the legal and equitable estate in the same land become invested in the same person, the equitable will merge in the legal estate;[1] and so, upon the same principle, in the case of mortgages, if the owner of the land becomes also the owner of the mortgage, the two titles will not, as a general rule, remain alive and distinct, but the title as mortgagee will sink into and be swallowed up in the more perfect and complete title as owner.[2] Now, it sometimes happens that to allow this general rule to operate would be productive of great hardship, and would be exceedingly inequitable; for it might be highly for the interest of the owner that the mortgage should be kept alive. Thus, cases have arisen in which the equity of redemption is liable to the dower of the wife of a former owner, which has been released to a former mortgagee. If, now, the purchaser of the equity of redemption subject to dower buys in the outstanding mortgage, it would be manifestly to his advantage that the mortgage should be kept alive, as otherwise the right of dower would be let in.[3] In such a case as this equity will treat the mortgage title as still subsisting, and will prevent the application of the doctrine of merger. Such an interposition of equity for the purpose of keeping the two titles distinct, will take place, unless there is a declared intention in favor of the merger, or unless such an intention can be presumed to exist from the circumstance that such a merger would be to the owner's advantage.[4]

161. In addition to the regular and ordinary mortgages above spoken of, there are other securities which are held in equity to be valid encumbrances, and which, partaking somewhat of the nature of mortgages, are frequently termed equitable mortgages.

Such are the vendor's lien for purchase-money; mortgages created by the deposit of title deeds; mortgages of equitable

[1] Perry on Trusts, § 347. See 2 Spence Eq. 879, 880.

[2] Washburn on Real Prop., Book I., Chap. XVI., Sec. VI.

[3] 2 Wash. on Real Prop. 181. See, also, Evans *v.* Kimball, 1 Allen, 240; Cook *v.* Brightly, 10 Wright, (Pa.) 439.

[4] Knowles *v.* Lawton, 18 Georgia, 476; Waugh *v.* Riley, 8 Met. 290; Van Nest *v.* Latson, 19 Barb. 604; Hutchins *v.* Carlton, 19 N. Hamp. 487; Den *v.* Brown, 2 Dutch. 196; Loomer *v.* Wheelwright, 3 Sand. Ch. 157; Moore *v.* Harrisburg Bank, 8 Watts, 138; Bryar's Appeal, 111 Pa. St. 81; Pike *v.* Gleason, 60 Ia. 150; International Bank *v.* Wilshire, 108 Ill. 143; Washburn on Real Prop., *ut sup.*

interests; and charges of certain kinds. These, however, are in the nature of *liens*, and do not result in the creation of an independent, equitable *title*. They will, therefore, be considered in the second general division of this treatise under a separate head.[1]

CHAPTER VIII.

ASSIGNMENTS.

162. Common-law rule forbidding assignment of *choses in action*.
163. Exceptions.
164. Such assignments allowed in equity.
165. Assignments of future property; *Holroyd* v. *Marshall*.
166. Exceptions to the general rule.
167. Requisites to an equitable assignment.
168. When notice of assignment necessary; to whom given.
169. Authorities in the United States conflicting.
170. Effect of equitable assignments; assignment is subject to equities between original parties.
171. Whether assignment is subject to equities of third parties.
172. Rights of action of the assignee at law; in equity.
173. Liability to be sued cannot be transferred; exceptions.

162. The subjects of property may be divided into two classes —things in possession, and things not in possession; and things not in possession may again be divided into those things of which there is a present right to the immediate possession, and those of which there is a mere right to the future possession. Thus a man may either own a cargo of oil (for example) which he has in his possession, or which he has an immediate right to recover from the possession of another who unlawfully detains

[1] See *post*, Part II., chapter on Liens. Mortgages of personal property will also be considered in the same connection. The general principles applicable to mortgages of personalty, so far as they relate to the creation of an equitable title, viz., the equity of redemption, and the existence of an equitable remedy, viz., a foreclosure bill, are the same as those which govern mortgages of real estate. But it has been thought that the brief notice which it is necessary to give to the subject of mortgages of personalty, may be more appropriately introduced in immediate connection with pledges of personalty, which will be considered in the chapter on Liens.

it, or which he has the present right to demand and receive at some future time, or which does not yet exist.

The consequences or incidents of these rights may vary, but in all of these cases there is a general, present, right or title of ownership, which any perfect system of justice ought to recognise, protect and enforce.

Now, the common law could only deal completely with the first of these rights or titles—that is to say, the only ownership which the common law completely recognised, was the ownership accompanied by possession. In such cases the owner could enjoy the property, or transfer it to another. But where the ownership and the possession were severed, the only right which the common law recognised was the right to recover the possession; in other words the right of the real owner was simply a lawsuit—a *chose in action*. And this right or *chose in action* he could not assign. Where there was a present right to the future acquisition of property, the common law was still more at fault, for there was not even a right to recover the goods, but only a right to recover damages for their non-delivery.[1]

At common law, these rights to things not in possession by whatever name they were called, whether *choses in action*, possibilities, expectancies, things not *in esse*, or mere contingencies, were, as a general rule, incapable of being assigned; the reason being twofold: first, that to allow such transfers would be to violate the rules against maintenance and champerty;[2] and, secondly, because there could be no valid sale unless the thing to be sold was *in rerum naturâ*, and under the immediate control of the vendor. Hence it was considered against sound policy to allow any man to transfer to another a mere right to recover in a suit at law, because, in this way (under the old conditions of society), litigation would necessarily be encouraged, and the

[1] These rights to property deliverable *in futuro* must be distinguished from remainders and reversions, in which the possession of the particular tenant enured to the benefit of the remainderman or reversioner.

[2] Co. Litt. 214, a; Lampet's Case, 10 Coke, 47; Cassedy *v.* Jackson, 45 Miss. 402; Thalheimer *v.* Brinckerhoff, 3 Cow. 623; Pelletreau *v.* Jackson, 11 Wend. 111; Jackson *v.* Waldron, 13 Id. 178; Needles *v.* Needles, 7 Ohio, (N. S.) 442; note to Ryall *v.* Rowles, 2 Lead. Cas Eq. 770 (4th Eng. ed.).

rich would be induced to buy up lawsuits for the purpose of enforcing them against the poor;[1] and hence, also, it was considered absurd to make a sale when the thing to be sold was not in the actual ownership of the seller. The common law, therefore, sought to prevent this result so far as mere *choses in action* were concerned, by a twofold method: in the first place, by punishing such transfers of rights of action as crimes, known in criminal jurisprudence as maintenance and champerty; and, in the second place, by refusing to recognise the title of the transferee of the debt or other *chose in action*, when he sought to recover upon it in a common-law suit. And it prevented the sale of things of which the vendor had not the immediate right to possession, by falling back upon the rude common-sense notion that if you had not a thing to sell you could not sell it; in other words, that to every bargain there must be an actual, subsisting subject.

163. To this general rule there were two exceptions, one resulting from the dignity of the person concerned, and the other rendered necessary by the character of the subject-matter of the transfer.

The king could be the assignee of a *chose in action*;[2] and an annuity (although in reality nothing more than a *chose in action*) could be assigned. The reason of the first of these two exceptions was, perhaps, the exalted rank of the individual, which forbade the application of the ordinary rules; for a transfer to the fountain and head of all justice, could not be supposed to work injustice. To except annuities from the operation of the rule was in fact illogical, as by strict reasoning they should undoubtedly have fallen within it; but it was, perhaps, felt that it would be oppressive if this very common species of property were not to enjoy the same qualities of alienability which were possessed by personalty in possession, and hence the exception sprang up out of a kind of necessity, and is now thoroughly established.[3]

[1] It will be remembered that, in early English history, the protection of the poor against the oppression of the rich was one of the great occasions which called for judicial interference, especially on the part of the chancellor. See *ante*. p. 11.

[2] Co. Litt. 232, b. n. Note to Ryall *v.* Rowles, *supra*.

[3] Gerrard *v.* Boden, Hetl. 80.

164. Such was the rule, and such the exceptions, at common law. In equity, while the rule which prohibits the transfer of mere litigious rights has been recognised and upheld, yet the exceptions to the common-law doctrine have been so numerous that the principle may now be stated to be firmly established, that, in equity, assignments of *choses in action*, possibilities, expectancies, things not *in esse*, and mere contingencies will be protected and enforced. The assignee is looked upon as the true owner of the *chose in action*, and is entitled to use it for his own purposes.[1] In other words, equity completely recognises and enforces the present ownership of things not in possession.[2]

Thus a debt, a mere chance of acquiring an estate,[3] an expectation of an inheritance,[4] or personal property not yet acquired by the assignor, or not yet *in rerum naturâ*, may all be assigned in equity, and the assignee can have relief in a court of chancery, if that relief is necessary to protect or enforce his title.

165. The principles upon which assignments in equity are based, especially those which have for their subject property to be acquired *in futuro*, have been discussed with great care and learning, during the last few years, in the highest English courts.

It had been decided by the courts of common law, that an assignment of future acquisitions, as, for example, the future freight, earnings, and profits of a ship, was void at law;[5] while in equity

[1] Morgan *v.* Bank of North America, 8 Serg. & R. 73; Ramsey's Appeal, 2 Watts, 228; Kountz *v.* Kirkpatrick, 22 P. F. Sm. 385.

[2] See Wright *v.* Wright, 1 Ves. Sr. 412; Hinkle *v.* Wanzer, 17 How. 353; Peyton *v.* Hallett, 1 Caines, 363; Cutts *v.* Perkins, 12 Mass. 206; Brooks *v.* Hatch, 6 Leigh, 537; Townshend *v.* Windham, 2 Ves. Sr. 6; Garland *v.* Harrington, 51 N. Hamp. 414; Row *v.* Dawson, 1 Ves. Sr. 331; 2 Lead. Cas. Eq. 731; Voyle *v.* Hughes, 5 Sm. & Giff. 18. In a case in Freeman, p. 144, Lord Keeper Bridgeman is reported to have said that the assignment of a chose in action would be protected only when made in satisfaction of some debt due to the assignee, and not when the assignment is voluntary or *for money then given*. This last is clearly not now the rule in equity.

[3] Hobson *v.* Trevor, 2 P. Wms. 191; Wethered *v.* Wethered, 2 Sim. 183; Fitzgerald *v.* Vestal, 4 Sneed, 258; Douglass *v.* Russell, 4 Sim. 524.

[4] Id; Varick *v.* Edwards, 1 Hoff. Ch. 382.

[5] Robinson *v.* Macdonnell, 5 Maule & Sel. 227; trover for the ship Warre and 500 tons of oil. This was the general rule at law; see Lunn *v.* Thornton, 1 C. B. 379; Hamilton *v.* Rogers, 8 Maryl. 301. The modern tendency of

the same assignment had been upheld.[1] But the opinion existed and continued to prevail for some time, that the equitable right would be imperfect and incomplete unless there was a subsequent possession or some act equivalent to it, for the purpose of perfecting the title; or, in other words, that the maxim of Bacon in regard to legal assignments, "Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens quæ fortiatur effectum interveniente novo actu," was applicable also to equitable assignments, and that the latter, equally with the former, would be incapable of enforcement, unless there was "novus actus interveniens."[2] Upon this ground Lord Chancellor Campbell decided the case of Holroyd *v.* Marshall, and held that where there had been an agreement, by which the machinery and implements thereafter to be brought into a mill should be subject to the trusts of a mortgage, and such machinery was afterwards brought in and had been taken in execution by creditors of the assignor before the equitable assignees had done anything to perfect their title, the assignment was invalid as against the execution-creditors. But on appeal to the House of Lords, this decree was reversed. In his judgment in that case, Lord Westbury gave a most lucid statement of the law upon the subject. The true ground upon which this and similar decisions are to be placed appears to be, that a court of equity enforces such assignments on the ground that the assignee is entitled to have immediate specific performance of the contract to assign, as soon as the property comes into existence, in the hands of the assignor. Neither in equity, nor in law, can a contract to transfer property not then in existence, operate as an immediate alienation, for the simple reason that there is nothing

courts of law is towards adopting the doctrines of courts of equity upon these subjects. Brown *v.* Bateman, L. R., 2 C. P. 272; Hope *v.* Hayley, 5 El. & Black. 829; Leslie *v.* Guthrie, 1 Bing. N. C. 697. See, however, Blakeley *v.* Patrick, 67 N. Carolina, 40, and Wyatt *v.* Watkins (Sup. Ct. Tenn.), 16 Albany L. J. 205; Note to McCaffrey *v.* Woodin, 22 Am. Rep. 644; Low *v.* Pew, 108 Mass. 347.

[1] In re ship Warre (in the matter of Robinson et al., Bankrupts), 8 Price, 269, n. See, also, Field *v.* The Mayor of New York, 2 Seld. 179; Emery *v.* Lawrence, 8 Cush. 151; Boylen *v.* Leonard, 2 Allen, 407.

[2] See American note to Row *v.* Dawson, 3 Lead. Cas. Eq. 347, where the authorities based upon this doctrine, which, in equity at least, is no longer sound, are collected.

to transfer. But immediately upon the acquisition of the thing, the assignor holds it in trust for the assignee, whose title requires no act on his part to perfect it, and cannot be disturbed by an execution-creditor of the assignor.[1] The assignee, however, has an equitable *title* from the time of the assignment; as is illustrated by the case of Ex parte Barber,[2] where an undertaking to hand over the bill of lading of a cargo of oil, then *en route* to the assignor, was held to give the assignee a right superior to that of the assignees in bankruptcy under a *fiat* issued eight days after the assignment.[3] The present transfer of future property, moreover, differs from the mere power to seize it.[4]

The doctrine that mortgages of personal property to be acquired in the future are valid in equity may be said to have become well established in America, and the authority of Holroyd *v.* Marshall, and the applicability of the principle upon which that decision was rested, have been expressly recognised. Thus in McCaffrey *v.* Woodin,[5] the lease of a farm gave the lessor a lien upon "personal property which may be put on said

[1] Holroyd *v.* Marshall, 10 H. L. Cas. 209. This case was twice argued in the House of Lords Upon the first argument, the law Lords present were Lords Campbell, Wensleydale and Chelmsford. Lord Campbell adhered to the opinion which he had pronounced as chancellor (2 De G., F. & J. 596), and Lord Wensleydale was disposed to agree with him; but Lord Chelmsford was in favor of reversing the decree. Upon the second argument, after the death of Lord Chancellor Campbell, Lord Westbury, then chancellor, delivered the opinion, referred to in the text, which induced Lord Wensleydale to change his mind, and confirmed Lord Chelmsford in his views. See further on this subject Wright *v.* Wright, 1 Ves, Sr. 411; Langton *v.* Horton, 1 Hare, 549; Lindsay *v.* Gibbs, 22 Beav. 522; Brown *v.* Tanner, L. R., 3 Ch. 597; Wilson *v.* Wilson, L R., 14 Eq. 32; Brown *v.* Bateman, L. R., 2 C. P. 272; Philadelphia, etc., R. R. *v.* Woelpper, 14 P. F. Sm. 372; Morrill *v.* Noyes, 56 Maine, 465; Mitchell *v.* Winslow, 2 Story, 630; Brett *v.* Carter, 2 Lowell's Dec. 458; Beall *v.* White, 4 Otto, 387; Williamson *v.* N. J. Southern R. R. Co., 10 C. E. Greene, 14; Stewart *v.* Kirkland, 19 Alab. 162; Pennock *v.* Coe, 23 How. 117; Pierce *v.* Emery, 32 N. H. 484; Benjamin *v.* Elmira R. R., 49 Barb. 441; Phillips *v.* Winslow, 18 B. Mon. 431; Sillers *v.* Lester, 48 Miss. 513; Pierce *v.* Mil. R. R. Co., 24 Wis. 551; Barnard *v.* Nor. & Wor. R. R., 14 N. B. R. 469. *Post*, Part. II., chap. on Liens.

[2] 3 Mont. Deac. & De G. 174.

[3] See also Gardner *v.* Lachlan, 4 My. & Cr. 129; Curtis *v.* Auber, 1 Jac. & Wal. 506.

[4] See Reeve *v.* Whitmore, 33 L. J. Ch. 63-66.

[5] 65 N. Y. 459. This case is also reported in 22 American Rep. 644, where some of the authorities will be found collected in a note.

premises;" and it was held by the Court of Appeals of New York that while in law the title did not pass, at all events until after the lessor had exercised the license by actual seizure, yet in equity the beneficial interest was transferred without the intervention of any *new* act, and the equitable title attached immediately upon the coming into existence or the acquisition of the property. Similar decisions have been made in the Federal courts, and in those of many States.[1] Of the cases of assignments of future acquisitions, mortgages by railroad companies of rolling stock and other personal property are perhaps of the most practical importance. The validity of such mortgages is now thoroughly established.[2]

The doctrine under consideration is of very great practical importance. If the right of the assignee rises (as it is here conceived it does) to the dignity of a title to the specific property, it cannot be defeated by an assignee in bankruptcy (for example) who could not, therefore, successfully resist an action, or rather a bill in equity, to recover the specific goods. If the right of the assignee is a mere right to recover damages for the non-fulfilment of a contract to deliver goods, he would necessarily come in, *pari passu*, with other creditors of the insolvent vendor.

It seems, however, that in order to create an equitable *title* or *estate* in the assignee, the property must be, in some way, specifically pointed out.[3]

[1] Butt *v.* Ellett, 19 Wallace, 544 (mortgage of future crops); Brett *v.* Carter, 2 Lowell's Dec. 458 (future stock of goods); Mitchell *v.* Winslow, 2 Story, 630; Wyatt *v.* Watkins, 4 Law & Eq. Reporter, 240 (mortgage of future crops); Apperson *v.* Moore, 20 Ark. 56 (future crops); Arques *v.* Wasson, 51 Cal. 620 (future crops); Everman *v.* Robb, 52 Miss. 653 (future crops). See, also, Bittenbender *v.* The Sunbury & Erie R. R. Co., 4 Wright, (Pa.) 269; Collins's Appeal, 107 Pa. St. 590; Walker *v.* Vaughn, 33 Conn. 577; Pennock *v.* Coe, 23 Howard, 117; Pullan *v.* Air Line R. R. Co., 5 Biss. 248; Smithurst *v.* Edmunds, 14 N. J. Eq. 408; Groton Manuf. Co. *v.* Gardiner, 11 R. Island, 626; Galveston R. R. Co. *v.* Cowdrey, 11 Wal. 459; United States *v.* New Orleans R. R. Co., 12 Id. 362; Tedford *v.* Wilson, 3 Head, 311; Sillers *v.* Lester, 48 Miss. 513; Phila., Wil. & Balt. R. R. *v.* Woelpper, 14 P. F. Sm. 366; Phillips *v.* Winslow, 18 B. Mon. 431; Pierce *v.* Mil. R. R. Co., 24 Wis. 551; Barnard *v.* Nor. & Wor. R. R. Co., 14 N. B. R., 469; 3 Cent. L. J. 608. Some decisions in this country are, however, the other way, the principal of these being Moody *v.* Wright, 13 Met. 17; Hutchinson *v.* Ford, 9 Bush, 318; and Lamson *v.* Moffat, 61 Wis. 153.

[2] See Jones on Mortgages, §§ 152, 153, 154, and 452.

[3] Belding *v.* Read, 3 Hurl. & Colt. 961; Morrill *v.* Noyes, 56 Maine, 465. See Benjamin on Sales, pp. 62–67.

A covenant affecting lands thereafter to be acquired, if it specifies the land, and the property is afterwards acquired with an intent to satisfy the covenant, will operate in equity upon the lands so afterwards acquired.[1]

166. To the general equitable rule which favors transfers of things not in possession, there are, however, certain exceptions, just as we have seen that there are exceptions to the common-law rule forbidding such assignments.

Thus, in equity a mere litigious right, the transfer of which would simply tend to encourage litigation, and thus fall within the spirit of the rule against maintenance, will not be recognised. Therefore a bare right to file a bill in chancery on the ground of fraud, cannot be assigned even in equity.[2]

So, too, equity will not recognise assignments of certain species of property, which it would be against the policy of the law to allow the owners to part with. These are pensions given as rewards for extraordinary services, pay or half pay in the army, the salaries of judges, claims against the United States,[3] and other revenues and emoluments of a kindred character, which reasons of state require should remain always for the benefit of the person to whom they were originally given.[4]

A purely personal trade-mark is not assignable.[5]

[1] Metcalfe *v.* The Archbishop of York, 1 M. & Cr. 547; Lyde *v.* Mynn, 4 Sim. 505; Wellesley *v.* Wellesley, 4 My. & C. 579; 2 Lead. Cas. Eq. 772. See, however, Countess of Mornington *v.* Keane, 2 De G. & Jo. 292.

[2] De Hoghton *v.* Money, L. R., 2 Ch. 169; Prosser *v.* Edmunds, 1 Y. & C. Exch. R. 481; Milwaukee and Minnesota Rd. *v.* The Milwaukee and Western Rd., 20 Wis. 183; Gardner *v.* Adams, 12 Wend. 297; Marshall *v.* Means, 12 Georgia, 61. See, also, Wilhite *v.* Roberts, 4 Dana, 172; Slade *v.* Rhodes, 2 Dev. & Bat. Eq. 24; Dayton *v.* Fargo, 45 Mich. 153; Jones *v.* Babcock, 15 Miss. App. 149; and In re Paris Skating Rink Co., 5 Ch. D. 959. The lien of a vendor for purchase-money was held not to be assignable in Richards *v.* Leaming, 27 Ill. 431; Keith *v.* Horner, 32 Id. 524; Elder *v.* Jones, 5 Reporter, 107; Dunklin *v.* Wilkins, 5 Alab. 199; McKee *v.* Judd, 2 Kernan, 622. Such an assignment will be set aside; Arden *v.* Patterson, 5 Johnson Ch. 44.

[3] Wood's Executors *v.* Dialogue, 15 Phila. 160; St. Paul & D. Rd. Co. *v.* U. S., 112 U. S. 733.

[4] Stone *v.* Lidderdale, 2 Anst. 533; Elwyn's Appeal, 17 P. F. Sm. 369; Emerson *v.* Hall, 13 Pet. 409; Arbuthnot *v.* Norton, 5 Moore, P. C. C. 219; though see State Bank *v.* Hastings, 15 Wis. 75; and Meriweather's Adm'r *v.* Herran, 8 B. Mon. 162; Collyer *v.* Fallon, 1 Turn. & Russ. 459; L'Estrange *v.* L'Estrange, 1 Eng. L. & Eq. 153; Preddy *v.* Rose, 3 Meriv. 102; Tunstall *v.* Boothby, 10 Sim. 542; Flarty *v.* Odlum, 3 T. R. 681; Lidderdale *v.* Montrose, 4 T. R. 248; Cooper *v.* Reilly, 2 Sim. 560; Perry on Trusts, § 69, notes 3 and 4.

[5] Kerr on Injunctions, 479.

It has been held, moreover, that the right of action for a mere personal tort cannot be assigned;[1] but a right to recover damages for an injury to *property* may undoubtedly be assigned.[2]

It was said in Mandeville *v.* Welch,[3] that an order drawn on a fund for only a part thereof, does not amount to an assignment of that part, for the reason that a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor. In other words, the rule was laid down that a *part* only of a *chose in action* cannot be assigned, but that if there is any transfer there must be a transfer of the whole. But this was in a common-law action; and although the rule has been approved in several cases, it may well be doubted whether it is sound as a doctrine of equity.[4]

It has been decided in many cases in this country that land held adversely cannot be assigned; and it has been further held, that as such assignments are considered void on the ground of public policy, they ought not to be enforced in equity.[5] In other States, however, the rule which forbids such assignments does not prevail.[6] An assignment of wages to "become due," when no employment exists at the time, is void;[7] but where there is an existing employment, it is otherwise.[8]

167. No particular form of words is necessary in order to make a valid assignment of a *chose in action*.[9] Nor is any written instrument required, for it is sufficient if there is a verbal declaration

[1] The People *v.* Tioga, 19 Wend. 73. See, also, Morris *v.* McCulloch, 2 Norris, 34; and Vermont *v.* C. & N. W. Rd. Co., 64 Iowa, 513.

[2] North *v.* Turner, 9 Serg. & R. 244; Butler *v.* The Railroad, 22 Barb. 110.

[3] 5 Wheat. 288.

[4] See Exchange Bank *v.* McLoon, 73 Me. 498; Caldwell *v.* Hartupee, 20 P. F. Sm. 74, 79; Smedley's Appeal, 35 Leg. Int. 235; Appeals of the City of Philadelphia, 5 Norris, 179; Field *v.* The Mayor of New York, 2 Seld. 179. It must be admitted, however, that the weight of authority is on the side of Mandeville *v.* Welch. See 3 Lead. Cas. Eq. 356. See, also, Chicago R. R. Co. *v.* Nichols, 57 Ill. 467; Jermyn *v.* Moffitt, 25 P. F. Sm. 399; Tyler *v.* Tuel, 6 Cranch, 324; Beardslee *v.* Morgan, 70 Me. 22.

[5] Hoppiss *v.* Eskridge, 2 Ired. Eq. 54.

[6] See note to Ryall *v.* Rowles 339; Edwards *v.* Parkhurst, 21 Verm. 472.

[7] Lehigh Valley Rd. *v.* Woodring, 19 W. N. C. 372; Kennedy *v.* Tiernay, 14 R. I. 528.

[8] Tiernay *v.* McGarrity, 14 Id. 231.

[9] Row *v.* Dawson, *supra;* Ex parte Alderson, 1 Mad. 53; Ex parte South, 3 Swanst. 392; Thompson *v.* Speirs, 13 Sim. 469; East Lewisburg L. & M. Co. *v.* Marsh, 10 Norris, 100; Gurnell *v.* Gardner, 4 Giff. 626; Buck *v.* Swazey, 36 Maine, 41; Conway *v.* Cutting, 51 N. Hamp. 407; Tingle *v.* Fisher, 20 W. Va. 497.

whereby the intention to part with the ownership of the *chose* is properly manifested.[1] Thus, if A. is a creditor of B., and wishes to transfer the debt to C., an order, verbal or written, from A., directing B. to pay the amount due to C., will be a good equitable assignment.[2]

So, also, where the owner of goods, then in the hands of his agent, promised a creditor by letter that he would direct the agent to deliver the goods to the creditor, and did subsequently give such a direction, it was held that this operated as an equitable assignment.[3] So, likewise, a parol agreement to transfer stock as collateral security, followed by the execution of a letter of attorney to transfer the same, has been held to amount to an assignment of the stock in equity.[4]

An order payable out of a particular fund may operate as an assignment of the fund;[5] but the better opinion would seem to be that a mere *promise* to pay out of a fund will not.[6] The first branch of this proposition seems to be well supported by authority,[7] but as to the latter there has been some fluctuation of opinion, although the more recent decisions in the United States decidedly support it. As long ago as 1744, it was decided in Bradley's case,[8] that a promise to pay a debt out of a sum due by a third person does not create a specific lien upon such sum,

[1] Gurnell *v.* Gardner, 9 Jur. N. S. 1226; Ford *v.* Stuart, 19 Johns. 342; Thompson *v.* Emery, 7 Foster, 269.

[2] Yeates *v.* Groves, 1 Ves. Jun. 281; Caldwell *v.* Hartupee, 20 P. F. Sm. 74.

[3] Burn *v.* Carvalho, 4 My. & Cr. 690. See, also, Langton *v.* Waring, 18 Com. B. (N. S.) 314; Ex parte Montague, L. R., 1 Ch. D. 554; Cabada *v.* De Jongh, 1 W. N. C. 342; consult Clemson *v.* Davidson, 5 Binney, 398.

[4] Lightner's Appeal, 1 Norris, (Pa.) 301; Taft *v.* Bowker, 132 Mass. 277, case of Savings Bank Book.

[5] East Lewisburg L. & M. Co. *v.* Marsh, 10 Norris, (Pa.) 96; Ex parte Butt, L. R., 4 Ch. D. 419; Clark *v.* Mauran, 3 Paige, 373; McLellan *v.* Walker, 26 Maine, 114; Cutts *v.* Perkins, 12 Mass. 206; Morton *v.* Naylor, 2 Hill, 585; Phillips *v.* Stagg, 2 Edwards, 108; Luff *v.* Pope, 5 Hill, 413; Nesmith *v.* Drum, 8 Watts & S. 9; Ferran's Estate, 1 Ash. 319; Caldwell *v.* Hartupee, 20 P. F. Sm. 74; Phœnix Iron Co. *v.* Philadelphia, 2 W. N. C. 596; Cabada *v.* De Jongh, 1 Id. 342.

[6] Rogers *v* Hosack, 18 Wend. 319; Ex parte Tremont Nail Co., 16 Nat. Bank Reg. 460.

[7] See, Diplock *v.* Hammond, 2 Sm. & G. 141; 5 De G., M. & G. 320; Gurnell *v.* Gardner, 4 Giff. 626; Hunt *v.* Mortimer, 10 B. & C. 44; Ex parte Carlon, 4 Dea. & Chitty. 120; Bank of United States *v.* Huth, 4 B. Mon. 423; Newby *v.* Hill, 2 Met. (Ky.) 530; Richardson *v.* Rust, 9 Paige, 243; Patton *v.* Wilson, 10 Casey, 299; Chase *v.* Petroleum Bank, 16 P. F. Sm. 169.

[8] Ridgway, 194.

Lord Hardwicke refusing a prayer for an injunction to stay the money in the debtor's hands, and saying that "he would not lay such embargoes upon persons to prevent their paying their debts." But in Rodick *v.* Gandell,[1] there is a dictum by Lord Truro to the effect that a *promise* to pay out of a particular fund would operate as an assignment, and this was followed by a decision of Vice-Chancellor Wood;[2] and the tendency of the English decisions would, therefore, seem to be in favor of holding a promise to operate as an assignment. In the United States, however, the weight of authority is decidedly the other way. The authorities were recently reviewed in Ex parte Tremont Nail Company,[3] and a conclusion adverse to the decision in Riccard *v.* Prichard reached.[4]

A simple draft, not identifying any particular debt or fund, will not be an assignment.[5]

And so a mere direction to an agent to collect money, and hand it over to a third party, will not amount to an assignment. Thus a railway contractor, being indebted to his bankers, wrote to the solicitors of the company authorizing them to receive the money due to him from the company, and pay it over to his bankers—and the solicitors then wrote to the bankers promising to pay them the money when raised; but it was held that this did not operate as an equitable assignment.[6] The difference between an order which will, and one which will not, operate as an assignment, appears to be this: If the order is such as to create a mere agency in the party to whom it is given to transfer the *chose* on behalf of the principal, then, like every other power of attorney, it will be revocable at pleasure, and can confer no title upon

[1] 1 De G., M. & G. 763.

[2] Riccard *v.* Prichard, 1 K. & J. 277. See, also, Field *v.* Magaw, L. R., 4 C. P. 660; Thomson *v.* Simpson, L. R., 5 Ch. 659.

[3] 16 N. B. R. 451.

[4] See, also, Hoyt *v.* Story, 3 Barb. 262; Geist's Appeal, 8 Outerbridge, 355; Christmas *v.* Russell, 14 Wall. 69; Trist *v.* Child, 21 Id. 441; Christmas *v.* Griswold, 8 Ohio St. 558; Connely *v.* Harrison, 16 La. Ann. 41; Eib *v.* Martin, 5 Leigh, 132; Ford *v.* Gardner, 15 Ind. 298; Pearce *v.* Roberts, 27 Mo. 179; Benford *v.* Sanner, 4 Wright, (Pa.) 9. See, however, Greenfield's Estate, 12 Harris, 232.

[5] Farmers' & Mechanics' Ins. Co. *v.* Simmons, 6 Casey, 299; Bank of Mount Joy *v.* Gish, 22 P. F. Sm. 13. See, also, Jermyn *v.* Moffit, 25 P. F. Sm. 399; Hopkins *v.* Beebe, 2 Casey, 85; Loyd *v.* McCaffrey, 10 Wright, 410; Laclede Bank *v.* Schuler, 120 U. S. 514.

[6] Rodick *v.* Gandell, 1 De G., M. & G. 763.

the third party until the transfer is actually made. But where the order purports to pass a present interest in the *chose* to the alleged transferree, then, no matter what form the transaction may assume, it will be treated in equity as a valid assignment.[1] Moreover, the mere delivery of the written evidence of the debt, may operate as a valid assignment.[2]

168. In order to complete the assignment as against the assignor, the assignee need not give notice thereof to the person who owes the debt, or has the custody of the fund which is intended to be assigned.[3]

And this is also so as against the creditors of the assignor,[4] or mere volunteers.[5]

But as against subsequent assignees for value, the assignee first in point of time must give notice to the debtor, otherwise he will be liable to be postponed to a second or third assignee, who has given notice. Between different assignees, the one who first gives notice to the debtor will, as a general rule, have the prior right. This is only in obedience to the general principle, which requires that all transfers of property must be rendered as complete as the nature of the transaction will permit, in order to

[1] See Hunt *v.* Rousmanier, 8 Wheat. 174; 1 Am. Lead. Cas. 676; Beers *v.* Spooner, 9 Leigh, 153; Tiernan *v.* Jackson, 5 Peters, 580; Watson *v.* Bagaley, 2 Jones, (Pa.) 164; Beans *v.* Bullitt, 7 P. F. Sm. 221; Insurance Co. of Pennsylvania *v.* Phœnix Ins. Co., 21 Id. 34; Wright *v.* Ellison, 1 Wall. 22; notes to Ryall *v.* Rowles, 2 Lead. Cas. Eq. 777.

[2] Mowry *v.* Todd, 12 Mass. 281; Runyan *v.* Mesereau, 11 Johns. 534; note to Row *v.* Dawson, 358. *Ante*, p. 104.

[3] Donaldson *v.* Donaldson, Kay, 711; Way's Trusts, 2 De G., J. & Sm. 365; Rodick *v.* Gandell, 1 De G., M. & G. 780; Gurnell *v.* Gardner, 4 Giffard, 626, 1220; Burn *v.* Carvalho, 4 My. & Cr. 690.

[4] Beavan *v.* Lord Oxford, 6 De G., Mac. & G. 492; Eyre *v.* McDowell, 9 H. L. Cas. 618, 652; Scott *v.* Lord Hastings, 4 K. & J. 633; Pickering *v.* The Ilfracombe Railway Co., L. R., 3 C. P. 235; Crow *v.* Robinson, Id. 264; The People *v.* Elmore, 35 Cal. 653; Kortright *v.* Buffalo, 20 Wend. 91; 22 Id. 348; McNeil *v.* The Tenth Nat. Bank, 46 N. Y. 328; Grymes *v.* Hone, 49 Id. 17, 22; The Mt. Holly Co. *v.* Feree, 2 C. E. Green, 117; United States *v.* Vaughan, 3 Bin. 394; Pellman *v.* Hart, 1 Barr, (Pa.) 263. See Pinkerton *v.* Railroad, 42 N. Hamp. 424, and Com. *v.* Watmough, 6 Whart. 117, as to the steps necessary to complete the transfer of a *chose in action*, as against the creditors of the assignor. These authorities are in conflict. See, also, Elliott's Ex'rs.' App., 14 Wright, (Pa.) 75; *post*, Fraud on Creditors.

[5] Justice *v.* Wynne, 12 Ir. Ch. R. 289.

make them valid as against subsequent *bona fide* purchasers, for valuable consideration, without notice.

Thus in the case of personal chattels, possession must be taken. And so in the case of *choses in action*, that which is equivalent to possession, viz., notice to the debtor, must exist in order to give the assignee a perfect title. In other words, the assignee must do everything to assert the ownership which the nature of the subject-matter of the contract will allow.[1]

But the assignee is not required to do *more* than is reasonably necessary.[2]

The assignee of a debt is not bound to give notice to the assignor if it is not paid. The rule which exists as to promissory notes in such cases, does not apply.[3]

The party to whom notice of an assignment should be given is he who has the legal title, or who owes the money. Thus, if personalty vested in trustees is assigned, notice should be given to the trustees; if a debt, to the debtor; if stock in a public company, to the company; if a future cargo of a ship, to the master.[4] If the fund to be assigned is in court, according to the English practice, a stop order should be obtained.[5] Notice to one of several trustees or joint debtors is in general notice to all; and notice may be by parol.[6]

169. The rule that in order to protect the title of an equitable

[1] See, *ante*, p. 101. See, also, Milroy *v.* Lord, 4 De G., F. & J. 264; Warriner *v.* Rogers, 28 Law Times Rep. (N. S.) 863; Ryall *v.* Rowles, 1 Ves. Sr. 348; Dearle *v.* Hall, Loveridge *v.* Cooper, 3 Russ. 1; Spain *v.* Hamilton's Admr., 1 Wal. 624; Martin *v.* Sedgwick, 9 Beav. 333; Buller *v.* Plunkett, 1 John. & H. 441; In re Barr's Trusts, 4 K. & J. 219; Ex parte Caldwell, L. R., 13 Eq. 188; 3 Lead. Cas. Eq. 373.

In the case of stock, "the better opinion would seem to be that a purchaser who perfects his right by obtaining a transfer on the books of a corporation will be preferred to a prior purchaser who has been less diligent or fortunate." Note to Ryall *v.* Rowles, 2 Lead. Cas. Eq. 1665 (4th Am. ed.); The New Haven & New York R. R. Co. *v.* Schuyler, 34 N. Y. 30; The People *v.* Elmore, 35 Cal. 653; The Bank of Commerce's Appeal, 23 P. F. Sm. 59; Sabin *v.* The Bank of Woodstock, 21 Verm. 353; Shipman *v.* The Ætna Ins. Co., 29 Conn. 245; Colt *v.* Ives. 31 Id. 55; Pinkerton *v.* The Manchester & Lawrence R. R. Co., 42 N. Hamp. 424. See, however, Mount Holly Co. *v.* Ferree, 1 C E. Green, 117.

[2] Feltham *v.* Clark, 1 De G. & Sm. 307.

[3] Glyn *v.* Hood, 1 De G., F. & J. 334.

[4] See note to Ryall *v.* Rowles, 348 *et seq.* (4th Eng. ed.).

[5] Id. 807.

[6] Id.

assignee as against a subsequent assignee, notice of the assignment should be given, is one that is based upon sound principle, and would seem, for many obvious reasons, to commend itself for adoption. It has accordingly been followed in many decisions in the United States.[1] But there are quite a number of cases in which a different doctrine has been held, and it is therefore impossible to say that any general rule upon the subject exists in this country.[2] The decisions, however, in favor of the English rule, appear to be based upon the more correct view of the law.

The assignment of a *chose in action* cannot be enforced by a mere volunteer, unless the transaction has so far progressed as to have assumed the nature of a voluntary trust, the incidents of which have already been discussed.

If there is a mere executory agreement to assign, that agreement, like any other, must be supported by a consideration;[3] but if a consideration exists a covenant to assign will operate as an assignment.[4]

170. The *effect* of these equitable assignments is next to be noticed.

And first, it must be remarked that the assignee will take the *chose* subject to all the equities between the original parties. Thus if the debtor has any defence or set-off which at the *time of the assignment* would be good as against the assignor, the same defence can be taken, or the same set-off made use of as against the assignee.[5] And so (for example) the assignment of anything

[1] Vanbuskirk *v.* The Hartford Ins. Co., 14 Conn. 145; Campbell *v.* Day, 16 Verm. 558; Loomis *v.* Loomis, 26 Id. 198; Clodfelter *v.* Cox, 1 Sneed, 330; McWilliams *v.* Webb, 32 Iowa, 577; Murdoch *v.* Finney, 21 Missouri, 138; Woodbridge *v.* Perkins, 3 Day, 364.

[2] See American note to Row *v.* Dawson, 2 Lead. Cas. Eq. 1666.

[3] Notes to Row *v.* Dawson. See Kennedy's Exrs. *v.* Ware, 1 Barr, (Pa.) 450, where Chief Justice Gibson seemed to think that all assignments were in their nature executory, and should be supported by a consideration.

[4] Townshend *v.* Windham, 2 Ves. Sr. 6.

[5] Turton *v.* Benson, 1 P. Wms. 497; In re Natal Investment Co., L. R., 3 Ch. App. 355; Bebee *v.* The Bank of New York, 1 Johns. 529; Kamena *v.* Huelbig, 8 C. E. Green, 78; Jeffries *v.* Evans, 6 B. Mon. 119; The Bank *v.* Fordyce, 9 Barr, 275; Andrews *v.* McCoy, 8 Alab. 920; Ragsdale *v.* Hagy, 9 Grat. 409; Barney *v.* Grover, 28 Verm. 391; American note to Row *v.* Dawson, 3 Lead. Cas. Eq. 369; 1 Parsons on Contracts, 227.

that is coming to a contractor, under a building contract, is necessarily subject to the conditions of that contract, and to the rights of the other party to that contract whatever they may be.[1] The debtor may, however, by his conduct estop himself from taking advantage of such a defence or set-off, if he actively misleads the assignee as to its existence, or improperly remains silent when fair dealing would command him to speak.[2]

Another case in which the assignee will not take subject to equities is that of negotiable paper; but this is not so much an exception to the general rule, as a particular custom, growing out of the law merchant in the case of bills of exchange, and extended to promissory notes by the statute of 3 and 4 Anne.

The assignee cannot be affected by collateral transactions, secret trusts, or acts unconnected with the subject of the contract.[3]

171. It has been decided in some cases, that the assignee of a *chose in action* will take it not only subject to the equities between the original parties to the contract, but also to existing equities in favor of third persons.[4] Thus, where there are two successive purchasers of the same equitable interest, the second purchaser, according to the authorities just cited, will take subject to the rights of the first. On the other hand, there are not wanting opinions to the effect that the asssignee of a *chose in action* is only subject to the equities of the party bound by its obligation (the debtor), and not to those of prior assignees.[5] The true solution of the difficulty would appear to be found in

[1] Tooth *v.* Hallett, L. R., 4 Ch. 245.

[2] In re Agra and Masterman's Bank, L. R., 2 Ch. 391; In re General Estates Company, L. R., 3 Ch. 758; Jones *v.* Hardesty, 10 G. & Johns. 404; Decker *v.* Eisenhauer, 1 P. & W. 476; Sargeant *v.* Sargeant, 18 Verm. 371; Bank *v.* Jerome, 18 Conn. 443; Watson's Exr's *v.* McLaren, 19 Wend. 557; and see *post*, Part II., Chap. III., Estoppel.

[3] Davis *v.* Barr, 9 Serg. & R. 137; Beckley *v.* Eckert, 3 Barr, 292; Mott *v.* Clark, 9 Id. 399; Taylor *v.* Gitt, 10 Id. 428; Corson *v.* Craig, 1 Wash. C. C. 424; Kountz *v.* Kirkpatrick, 22 P. F. Sm. 385:

[4] Bush *v.* Lathrop, 22 N York, 535; Schafer *v.* Reilly, 50 Id. 67; note to Row *v.* Dawson, 3 Lead. Cas. Eq. 372.

[5] Livingston *v.* Dean, 2 Johns. Ch. 479; Murray *v.* Lylburn, Id. 441; Taylor *v.* Gitt, 10 Barr, 428; Mott *v.* Clark, 9 Id. 399; Mullison's Estate, 18 P. F. Sm. 212; Metzgar *v.* Metzgar, 1 Rawle, 227; Moore *v.* Holcombe, 3 Leigh, 597; note to Row *v.* Dawson, 3 Lead. Cas. Eq. 373.

correctly applying the maxim that between equal equities priority of time will prevail,[1] the meaning of which is, that as between persons having only equitable interests, if such equities *are in all other respects* equal, *qui prior est tempore, potior est jure.*[2] If there is nothing else in the case to turn the scale, and the only fact before the court is the bald fact of priority of time, *that*, of course, will be conclusive. But in practice this is scarcely ever the case. It almost universally happens that two other questions have to be taken into consideration—the question of *laches*, and that of notice.[3] If the first purchaser has been guilty of *laches*, his equity becomes inferior to that of the second purchaser, and the equity of the latter will then prevail; for priority of time is the *last* ground of preference resorted to, and will never be considered if there is anything else to turn the scale.[4] On the other hand, the second purchaser may, under the circumstances of the particular case, be in a condition to avail himself of the plea of a *bona fide* purchaser for value without notice; and it is now well settled that such a plea is available for the protection of an equitable, as well as a legal title.[5]

Therefore, in examining into the relative merits (or equities) of two persons having adverse equitable interests, the points to which attention must be directed are these: the nature and condition of their respective equitable interests; the circumstances and manner of their acquisition; and the whole conduct of each party with respect thereto.[6] If the inquiry be directed to these grounds, a decision on the narrow point of priority of time will seldom, if ever, be found necessary.

172. Another effect of the assignment is that the assignee acquires thereby the right to make use of the name of the assignor, in an action at law to recover the *chose*. The suit must be brought in the name of the original assignor to the use

[1] *Ante*, p. 63; Phillips *v.* Phillips, 10 W. R. 236.

[2] See Snell's Equity, 17; and Rice *v.* Rice, 2 Drew. 73, where the subject is clearly discussed by V.-C. Kindersley.

[3] Rice *v.* Rice, *ut sup.*

[4] Rice *v.* Rice, 2 Drew. 73; The Queen *v.* Shropshire Union R. R. & Canal Co., L. R., 8 Q. B. 420; L. R., 7 Eng. & Ir. App. 496–516, where the Exch. Ch. was reversed. See, also, Maybin *v.* Kirby, 4 Rich. Eq. 105; and Judson *v.* Corcoran, 17 Howard, 612.

[5] Colyer *v.* Finch, 5 H. L. Cas. 905, 920.

[6] Rice *v.* Rice; The Queen *v.* Shropshire Union Co.; *ut sup.*

of the assignee; and courts of law now entertain such an action, and a recovery may thus be had in a common-law suit. The consequence of this right of the assignee to use the name of the assignor is, that a court of equity will not ordinarily entertain a bill, in the first instance, filed by the assignee against the debtor simply for the purpose of recovering the debt. Thus, if A. is a creditor of B., and transfers the debt to C., this circumstance alone will not justify C. in filing a bill in equity against B. to recover the sum due. C.'s remedy, in the first instance, is a common-law action brought against B. in A.'s name to C.'s use.[1] If, however, A. interferes in the matter for the purpose of preventing C. from using his name, or any other circumstance exists by which C.'s right to recover at common law would be likely to be defeated, this will give rise to a jurisdiction in equity, and a bill to enforce the assignment and collect the debt will then be entertained. In cases in which it is proper to resort to equity, the assignee can file a bill in his own name.

While, however, in many instances the assignee may sue at law in the name of the assignor, certain cases still exist in which the remedy of the assignee is in equity alone.[2]

173. In leaving the subject of this chapter, it may be proper to remark that the liability to be sued cannot be transferred or assigned; that is to say, a person bound by a contract cannot, before or after breach, relieve himself from the obligation to perform it by assignment to another; nor will the assignee, without some stipulation on his part, be rendered liable.[3] The exceptions to this rule are: the assignment of liabilities on covenants which "run with the land;" the assignment of liability for a debt by agreement among all the parties interested; and the assignment of liabilities in consequence of marriage, bankruptcy or death.[4]

The rule upon this subject is the same in equity as at law.

[1] See Chicago Rd. *v.* Nichols, 57 Ill. 466; Hayward *v.* Andrews, 106 U. S. 672; New York Guarantee Co. *v.* Memphis Water Co., 107 U. S. 205.

[2] Hammond *v.* Messenger, 9 Sim. 327; Ontario Bank *v.* Mumford, 2 Barb. Ch. 596; Adair *v.* Winchester, 7 Gill & Johns. 114; Smiley *v.* Bell, Mart. & Yerg. 378; Moseley *v.* Boush, 4 Rand. 392; Hagar *v.* Buck, 42 Vt. 290. See 1 Parsons on Contracts, 224, note (*d*).

[3] See Dicey on Parties to Actions, pp. 76, 234.

[4] Id.

PART II.

EQUITABLE RIGHTS.

CHAPTER I.

ACCIDENT AND MISTAKE

174. Definition of Accident.
175. Limitations upon the relief afforded in equity.
176. Cases in which relief will be afforded.
177. Lost instruments; advantages of remedy in equity.
178. Penalties.
179. Liquidated damages.
180. Agreements for reduction of debt.
181. Forfeitures.
182. Defective execution of powers.
183. Miscellaneous cases.
184. Equitable remedies in cases of Mistake.
185. Definition of Mistake.
186. Mistakes of two kinds—of Law and of Fact.
187. Mistakes of Law; *Hunt* v. *Rousmaniere.*
188. Misrepresentation and Surprise.
189. Compromises of doubtful rights; family arrangements.
190. Mistakes of Fact; different kinds.
191. Must be mutual, material, and not induced by negligence.
192. Defective execution of powers.
193. What defects may be remedied.
194. For whose benefit.
195. Against whom.
196. Miscellaneous cases.

174. Having considered those cases in which courts of equity afford relief by the creation of titles not known at common law, the next class of subjects for investigation embraces those cases in which chancery affects and controls the enjoyment of legal titles by the operation of certain rights known as equities. Among the first of these equities which present themselves for consideration, are those of Accident and Mistake.

Accident is one of those "cases of extremity," which, in the early days of chancery jurisdiction, gave to the suitor his right to appeal to the conscience of the chancellor. The particular case afterwards furnished the generic name to this head of juris-

diction, and the term "accident" is now commonly used to include all cases of extremity.[1]

It has been said by a celebrated writer that all attempts to define what accident, in its equitable signification, is, have been unsuccessful;[2] nevertheless it has been described by a modern author to be an unforeseen and injurious occurrence not attributable to mistake, neglect or misconduct;[3] and this definition seems to be both accurate and comprehensive. A person who has been the sufferer from some such unforeseen occurrence, which cannot be ascribed to his own negligence, folly or fault, or possibly to his own gross ignorance as to the legal effect of his acts,[4] is entitled, as a general rule, to relief in equity, because, ordinarily, the courts of common law did not, in such cases, afford redress.

175. Common-law courts, however, did not refuse relief in every case,[5] nor do courts of equity grant redress in all; for the jurisdiction of a court of chancery in cases of accident, is circumscribed and defined by certain rules.

Thus equity will not interfere where there has always been an adequate remedy at law. When, however, the jurisdiction of equity has once attached by reason of the original refusal of courts of law to entertain such a case, that jurisdiction of chancery, once acquired, cannot be ousted by any subsequent assumption of jurisdiction in such cases on the part of the courts of law; nor because authority to afford relief has been conferred on common-law courts by statute.[6] This is only in accordance with the general maxim already explained.[7]

Equity, moreover, will not interpose to remedy an accident which is the result of the gross neglect or fault of the party

[1] Spence, 628. See East India Co. *v.* Boddam, 9 Ves. 466; Armitage *v.* Wadsworth, 1 Mad. 189–193; Story's Eq. Jurisp., § 79.

[2] 1 Spence, 628.

[3] Smith's Manual of Equity, 36. See, also, Story's Eq. Jurisp., § 78.

[4] Sims *v.* Lyle, 4 Wash. C. C. 320.

[5] 3 Blackstone Com. 431. "Many accidents are supplied in a court of law, as loss of deeds, mistakes in receipts and accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies." Id.

[6] See Case *v.* Fishback, 10 B. Mon. 40; Hall *v.* Hall, 43 Alab. 488.

[7] *Ante*, page 54 *et seq.*; British Empire Shipping Co. *v.* Somes, 3 K. & J. 437; Snell's Eq. 335; Story's Eq. Jurisp., § 80.

seeking relief.[1] It would, for example, decline to afford relief to the obligee in a bond who has himself destroyed the instrument.[2] But when the accident occurs through the act of God, the rule may, under some circumstances, be modified.[3]

Again, a chancellor will not afford relief so as to entirely release a person from doing something which he has expressly covenanted to do, but of which the performance has become unexpectedly harsh or burdensome. The instance of this rule which is usually given, is the destruction of demised premises by fire, in which case, if there is an express covenant to pay the rent, the tenant is compelled to pay, although he has quite lost the enjoyment of the premises; and he can have no relief in equity.[4]

Care must be taken to distinguish these cases from that of a penalty incurred by reason of the non-performance of a covenant on a stipulated day, for against such a forfeiture (if the injury inflicted by the non-performance of the covenant can be compensated by damages) equity will relieve. The difference is this: in the case of a forfeiture the plaintiff asks to be relieved from the penalty only, not from his covenant; but in the case above put, of the destruction of demised premises by fire, the tenant asks that the court should relieve him entirely from the obligation to pay rent which he has assumed, and *this* a court of equity will decline to do.

Equity will not interfere on the ground of accident against a *bonâ fide* purchaser for value without notice, or, indeed, in any case in which the equity of the party against whom the relief is sought is equal or superior to that of the party who invokes the aid of the court. On the other hand, a chancellor will not interpose upon the application of a mere volunteer.[5]

176. Subject to the qualifications above stated, equity will relieve when deeds or other instruments are lost, when penalties are accidentally incurred, when powers are defectively exercised,

[1] Marine Ins. Co. *v.* Hodgson, 7 Cranch, 336; Penny *v.* Martin, 4 Johns. Ch. 569; Barnet *v.* Turnpike Co., 15 Verm. 757.

[2] Davis *v.* Davis, 6 Ired. Eq. 418. Ex parte Greenway, 6 Ves. 813.

[3] Chase *v.* Barrett, 4 Paige, 148.

[4] See Smith's Land. and Ten. 202. See, also, Fowler *v.* Bott, 6 Mass. R. 63; Hallett *v.* Wylie, 3 Johns. R. 44; Brewer *v.* Herbert, 30 Md. 301.

[5] Story's Eq. Jurisp., § 106, *et seq.*

and in certain miscellaneous cases which cannot be grouped under general heads.[1]

177. Equity, then, has, in the first place, a jurisdiction to give relief when bonds or other documents are lost,[2] and the loss obstructs the right of the plaintiff at law, or leaves him exposed to undue perils in the future assertion of such rights. The *mere* loss will not be sufficient to give equity jurisdiction; but the party must show that he has no remedy or no sufficient remedy at law.

Apart from the fact that a re-execution of the instrument may be ordered,[3] the superiority of the equitable over the legal relief is shown in many ways. In equity, suitable indemnity can always be exacted from the complainant, so that recovery upon a lost instrument may be had, and, at the same time, the defendant may be sufficiently protected against any contingent liability growing out of the subsequent discovery of the instrument, and an assertion of rights under the same by any other party. Indemnity can, indeed, be required in common-law actions, especially in this country, where not only equitable principles, but also equitable practice, have been, in many instances, infused into the common-law forms.[4] Nevertheless, the ability of courts of equity to require such a stipulation is undoubted, and has been one of the grounds on which the jurisdiction in cases of accident has been supported.

An alternative decree may be framed in equity, so as to do justice either in the event of the continued loss or withholding of the instrument, or in that of its discovery or production.[5] Mere declaratory decrees, *i. e.*, decrees declaring the rights of parties to property, of which they are already in possession, but

[1] Equity cannot restore the lost records of another court; Keen *v.* Jordan, 13 Florida, 327; though it may confirm a title acquired under lost records; Garratt *v.* Lynch, 45 Alab. 204.

[2] Story's Eq. Jurisp., § 84. See East India Co. *v.* Boddam, 9 Ves. 466; Donaldson *v.* Williams, 50 Missouri, 408; Patton *v.* Campbell, 70 Ill. 72.

[3] The jurisdiction of equity is frequently described as extending to cases of loss, destruction or suppression of deeds; but *suppression* must be a fraud, and equity would have jurisdiction under that head. See *post*, Part III., chap. on Re-execution and Cancellation.

[4] Bridgeford *v.* Masonville Manuf. Co., 34 Conn. 546; Almy *v.* Reed, 10 Cush. 421; Smith *v.* Rockwell, 2 Hill, (N. Y.), 482; Fales *v.* Russell, 16 Pick. 315; Story's Eq. Jurisp., § 82.

[5] Story's Eq. Jurisp., 84.

of which their title may be disputed, may be entered in equity.[1] Such decrees are, of course, beyond the power of the common-law courts, for *there* the party in possession could bring no action by which his title could be ascertained as against a threatened claim.

Profert of bonds may be dispensed with in equity; whereas at law such profert had to be made in the declaration; and the instrument produced, if required. The old common-law rule has indeed been altered, and a party may now *excuse* a profert, stating his excuse in the declaration.[2] But equity, having acquired jurisdiction under the law as it formerly stood, still retains it in such cases.[3]

It is one of the safeguards with which equity surrounds a defendant in the cases now under consideration; that the plaintiff must file an affidavit of the loss of the instrument.[4] In some instances, it is true, relief has been afforded where the proof of loss was very clear, although no affidavit had been filed; but, as a general rule, an affidavit will be demanded,[5] for it is required not so much as evidence of loss, as security for the propriety of jurisdiction.[6]

As to promissory notes the rule seems to be, that, where the note is negotiable and is lost before it becomes due, no recovery

[1] See Rex *v.* Arundel, Hob. 108 (b); Worthy *v.* Tate, 44 Georgia, 152; Story's Eq. Jurisp., § 84. This doctrine, however, is not carried to the extent of holding that bills may be filed for the *mere* purpose of having future rights declared. There must be some present ground for redress, such as discovery, accident, etc. See *post*, § 571.

[2] See Chitty's Pleading, 365. See, also, Ex parte Greenway, 6 Vesey, 811; East India Co. *v.* Boddam, 9 Id. 466.

[3] Bromley *v.* Holland, 7 Vesey, 18.

[4] Except in cases of bills for discovery only; for it is presumed that no person who is in possession of the instrument would file a bill for the discovery of it, especially when the expense of a discovery all falls upon the plaintiff. Goldsmith's Doctrine of Equity, 82; Daniel's Ch. Prac. 395, 396; Story's Eq. Pleading, § 288.

[5] Chewning *v.* Singleton, 2 Hill Eq. 371; Hill *v.* Lackey, 9 Dana, 81; Owen *v.* Paul, 16 Alab. 130; Pennington *v.* The Governor, 1 Blackf. 78; Thornton *v.* Stewart, 7 Leigh, 128; Livingston *v.* Livingston, 4 Johns. Ch. 294; Graham *v.* Hackwith, 1 A. K. Marsh. 424; Parsons's Adm. *v.* Wilson, 2 Tenn. R. 260; Webb *v.* Bowman, 3 J. J. Marsh. 73; 1 Dan. Chan. Prac. 395.

[6] East India Co. *v.* Boddam, 9 Ves. 466. See Bromley *v.* Holland, 7 Ves. 18.

can be had at law, and the remedy is solely in equity.[1] But if the note was not negotiable, or the loss happened after the note fell due, the party has a remedy at law; and as profert of a promissory note is not necessary, the remedy at law is complete, and the party has no standing in equity, unless, of course, some other and special ground is laid.

178. Another class of cases in which equity originally afforded relief, on the ground of accident, is that of penalties.

Accident is undoubtedly the origin of the jurisdiction of chancery upon the subject of penalties; but subsequently the jurisdiction was extended to embrace all questions as to penalties irrespective of accident.[2]

The penalty named in a bond was originally inserted for the purpose of "evading the absurdity of those monkish constitutions which prohibited taking interest for money, and was, therefore, very pardonably considered the real debt in courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest; for the judges could not, as the law then stood, give judgment that the interest should be specifically paid."[3] The reason of this rule ceased when interest was allowed by statute to be recovered; but the narrow and illiberal views which were entertained at this time, in courts of law, prevented the judges from taking advantage of the circumstance to alter the rule; and the suitor was consequently driven into chancery. The jurisdiction of chancery, as has been already stated, originally arose when the obligor was prevented by accident from paying the sum on the day named; but it was afterwards extended, and now embraces all cases of default from whatever cause—upon the principle that compensation and not forfeiture is the just and equitable rule which is to be applied to all cases, and that when a debtor pays the debt, with interest for its detention, and costs, he ought not to be mulcted in a further sum. This reasonable rule soon found its way into the statute book, and acts of parliament were passed allowing courts

[1] See Byles on Bills (Sharswood), 300. 301, and notes; Wright *v.* Maidstone, 1 K. & J. 701; Savannah Nat. Bank *v.* Haskins, 101 Mass. 370.

[2] See 1 Spence Eq. 629, 630.

[3] 3 Black. Com. 434.

of common law to afford the same relief.[1] These, or similar statutes, are in force generally in the United States; and the necessity for the exercise of chancery interference has, therefore, to a great extent, passed away; but its jurisdiction still remains.[2]

179. The question which, perhaps, most frequently arises, is whether the sum named is to be regarded as a penalty, or as the amount of damages which the parties have agreed shall be recovered in case of a breach of the covenant. Against a penalty equity will relieve; but not against stipulated (or liquidated) damages.[3]

The mere use, however, of the words "stipulated damages," will not determine the rule to be applied; *that* will depend upon the substantial nature of the contract.[4] The general result of the authorities has been correctly stated to be, that, "when the injury is susceptible of definite admeasurement, as in all cases where the breach consists in the non-payment of money, the parties will not be allowed to make a stipulation for a greater amount, whether in the form of a penalty, or of liquidated damages. But when, on the other hand, the injury in question is uncertain in itself, and unsusceptible of being reduced to certainty by a legal computation, it may be settled beforehand by special agreement."[5] In all cases, however, it is a question of intention.[6]

180. Another question which often presents itself for consideration is, whether an agreement for the reduction of a debt, in case of prompt payment, or the performance of some other condition, shall be governed by the ordinary rules which are applicable to penalties.

[1] 8 and 9 Wil. III., ch. 11, § 8; 4 and 5 Anne, ch. 16, §§ 12, 13. It was said, in Betts *v.* Burch, 4 Hurl. & Nor. 506, that the courts seem to have granted relief without reference to the statutes, and on general principles. See 2 Lead. Cas. Eq. 1098 (4th Eng. ed.).

[2] See the notes to Peachy *v.* The Duke of Somerset, 2 Lead. Cas. Eq. 1096 (4th Eng. ed.); 3 Id. 895 (3 Am. ed.).

[3] Skinner *v.* Dayton, 2 Johns. Ch. 526; Hackett *v.* Alcock, 1 Call, 533; Asher *v.* Pendleton, 6 Grat. 628.

[4] Hamaker *v.* Schroers, 49 Missouri, 406; Morris *v.* McCoy, 7 Nevada, 399; Lee *v.* Overstreet, 44 Geo. 507; notes to Peachey *v.* Duke of Somerset, 3 Lead. Cas. Eq. (3d Am. ed.) 677.

[5] Nesbit *v.* Brown, 1 Dev. Eq. 30; Rogan *v.* Walker, 1 Wis. 527; 3 Lead. Cas. Eq. (3d Am. ed.) 683.

[6] Id. See, also, Cotheal *v.* Talmage, 5 Seld. 551; Streeper *v.* Williams, 12 Wright, (Pa.) 454; Shreve *v.* Brereton, 1 P. F. Sm. 175; Chase *v.* Allen, 13 Gray, 45; Fisk *v.* Gray, 11 Allen, 132; 3 Parsons on Contracts, 156.

The law upon this subject, and, indeed, upon the general question of penalties, has been stated with great clearness in the case of Thompson *v.* Hudson,[1] decided in 1869, in the House of Lords. Equity, it was there said, will always look to the substance of the transaction; if the substance is inequitable, equity will relieve against it, or will not enforce it—if it is not so, equity will enforce the agreement.[2] The law is perfectly clear, that, where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage, or be it by way of stipulation, that, in case of its not being paid at the time appointed, a larger sum shall become payable, and be paid; in either of these cases, equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged or any augmentation of the debt as a penal provision, on the ground that equity regards the contemplated forfeiture, which might take place at law with reference to the estates, as in the nature of a penal provision, against which equity will relieve when the object in view, viz., the securing of the debt, is attained, and regarding, also, the stipulation for the payment of a larger sum of money, if the sum be not paid at the time it is due, as a penalty and a forfeiture against which equity will relieve. It is equally clear, upon the other hand, that, where there is a debt due, and an agreement is entered into at the time of that debt having become due, and not being paid, in regard to further indulgence to be conceded to the debtor, or further time to be accorded to him for the payment of the debt, or in regard to his paying it immediately, if that be a portion of the stipulations of the agreement, or at some future time which may be named, and the creditor is willing to allow him certain advantages and deductions from that debt, as well as to extend the time for its payment, if adequate and satisfactory security is afforded him as a consideration, then it is perfectly competent to the creditor to say that if the payment is not made *modo et formâ* according to the stipulation, the right to the original debt reverts.[3] In other words, it is right

[1] L. R., 4 H. L. Cas. 1.

[2] By Lord Selborne (then Sir Roundel Palmer) and L. J. Mellish (then Mr. Mellish), *arguendo* for appellants.

[3] See opinion of Lord Hatherley in L. R., 4 H. L. Cas. 15.

and rational for a creditor to say to his debtor: "Provided you pay me half of the debt or two-thirds of the debt on an appointed day, I will release you from the rest, and will accept the money so paid in discharge of the whole debt; but if you do not make payment of it on that day, then the whole debt shall remain due to me, and I shall be at liberty to recover it;" and this is the view which a court of equity will adopt.[1]

In accordance with these principles, it has been decided, that, where a mortgage provides for the payment of sums by instalments, and contains a stipulation for the payment of the whole sum due in default of payment of any such instalment, such proviso is binding and not in the nature of a penalty.[2]

A man cannot escape from the specific performance of an agreement by electing to pay the penalty for the breach. "If a man, for instance, agrees to settle an estate, and executes his bond for a certain sum as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond, and avoid his agreement, but he will be compelled to settle his estate in specific performance of his agreement."[3]

181. The relief afforded in cases of penalties is only an instance of a general rule; for the same species of redress will be afforded in all cases of forfeiture resulting from non-payment of money, and in all cases where the damage incurred by non-performance is susceptible of pecuniary measurement, and, therefore,

[1] Thompson *v.* Hudson—opinion of Lord Westbury, L. R., 4 H. L. Cas. 27. "If you were to put that proposition," said Lord Westbury, "to any plain man walking the streets of London, there could be no doubt at all that he would say that it is reasonable and accordant with common sense. But if he was told that it was requisite to go to three tribunals before you could get that plain principle and conclusion of common sense accepted as law, he would, undoubtedly, hold up his hands with astonishment at the state of the law."

[2] Sterne *v.* Beck, 11 Weekly Rep. 791; Robinson *v.* Loomis, 1 P. F. Sm. 78; The People *v.* The Sup. Ct. of N. Y., 19 Wend. 104; Noyes *v.* Clark, 7 Paige, 179; The Plank Road Co. *v.* Murray, 15 Ill. 337; Baldwin *v.* Van Vorst, 2 Stockt. Ch. 577.

[3] Per Lord St. Leonards in French *v.* Macale, 2 Dr. & War. 275: Gordon *v.* Brown, 4 Ired. Eq. 399; Dooley *v* Watson, 1 Gray, 414; Canal Co. *v* Sansom, 1 Binney, 70; Brown *v.* Bellows, 4 Pick. 179. See, however, Perkins *v.* Lyman, 11 Mass. 76; Pearson *v.* Williams, 26 Wend. 630; Williams *v.* Green, 14 Ark. 315, 322; Bodine *v.* Glading, 9 Harris, (Pa.) 50, 54. 3 Lead. Cas. Eq. 685 (3d Am. ed.).

of compensation.[1] But equity will not, in general, and in the absence of special circumstances calling for interference, give relief in cases of forfeiture growing out of breach of covenant for repairing, insuring, or doing any specific act.[2] The ground of this difference is, that in such cases it is unknown "what the measure of damages shall be."[3] Therefore, it cannot be argued that there is any right in a court of equity, or any practice of such a court to give relief in cases of this kind by way of *mercy*, or by way *merely of saving property from forfeiture.* But relief may be afforded in some cases, for it is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties, or legal forfeiture—afterwards by their own act, or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to do so where it would be inequitable, having regard to the course of dealing between the parties. Hence, it was decided in a comparatively recent case in the House of Lords, that where a notice to repair has been given, and the lessee makes an offer to sell his interest in the premises, and a negotiation takes place on that offer, the effect of that offer and the negotiation is to suspend the notice till the negotiation has been terminated, from which event alone the date of

[1] Hagar *v.* Buck, 44 Verm. 285; Bowser *v.* Colby, 1 Hare, 128. See further upon this subject, Gregory *v.* Wilson, 9 Hare, 683; Bargent *v.* Thompson, 4 Giff. 473; Nokes *v.* Gibbon, 3 Drew. 681; Hill *v.* Barclay, 18 Ves. 62; Bracebridge *v.* Buckley, 2 Price, 200; Walker *v.* Wheeler, 2 Conn. 299; Michigan State Bank *v.* Hammond, 1 Doug. (Mich.) 527; Hancock *v.* Carlton, 6 Gray, 39; Thompson *v.* Whipple, 5 R. I. 144; Palmer *v.* Ford, 70 Ill. 369; Orr *v.* Zimmerman, 63 Missouri, 72.

[2] Nor will it, except under special circumstances, relieve against the non-performance of a condition precedent. Reves *v.* Toulman, 25 Alab. 452.

[3] Wafer *v.* Mocato, 9 Mod. 112; Reynolds *v.* Pitt, 19 Ves. 141; De Scarlett *v.* Dennett, 9 Mod. 22; Sparks *v.* Liverpool Waterworks, 13 Ves. 428; Germantown Pass. Railway Co. *v.* Fitler, 10 P. F. Sm. 131; Dunklee *v.* Adams, 20 Verm. 415. In England parties who have been guilty of a forfeiture for non-compliance with a covenant to insure are now relieved by Stat. 22 and 23 Vic. c. 35, under certain circumstances, and upon certain conditions.

the notice can properly be calculated; and that equity would relieve against an ejectment founded on the original notice.[1]

It is well settled that a court of equity will not lend its aid actively to enforce a forfeiture.[2] Thus, in the Oil Creek Railroad Company *v.* The Atlantic and Great Western Railroad Company, a bill was filed to enforce the forfeiture of a lease granted by the complainants to the defendants, on the ground that the latter had forfeited their right to the same by their failure to build a road within the time prescribed, in accordance with the express provisions of the lease. The Court was distinctly asked to enforce what had been agreed upon by the parties should be a forfeiture. But the prayer of the bill was refused on the express ground that a court of equity will never lend its assistance in the enforcement of a forfeiture, but will leave the parties to their legal remedies.[3] In some cases, however, the enforcement of a forfeiture may be regarded in equity with favor.[4]

182. The third class of cases in which equity will relieve on the ground of accident embraces defective execution of powers.[5] This subject will be more fully considered under the next head of equity jurisdictiou—that, namely, of Mistake. It will be sufficient to say, at present, that in cases of accident, equity will relieve, where there is a *defective* execution of a power, but not where there is a *non*-execution, in favor of a purchaser, a creditor, a wife, a child, or a charity; but not in favor of the donee of the power, or a husband, or grandchildren, or remote relations, or strangers; and not where there are any opposing

[1] Hughes *v.* Directors of the Metropolitan Railway, L. R., 2 App. Cas. 439.

[2] Livingston *v.* Tompkins, 4 Johns. Ch. 415; Warner *v.* Bennett, 31 Conn. 468; Smith *v.* Jewett, 40 N. Hamp. 534; 4 Kent's Com. 130.

[3] Oil Creek R. R. Co. *v.* Atlantic & Great Western R. R. Co., 7 P. F. Sm. 65; McKim *v.* White Hall Co., 2 Maryl. Ch. 510; White *v.* Port Huron & M. R. R. Co. 13 Mich. 356; Clarke *v.* Drake, 3 Chand. 253; Gordon *v.* Lowell, 21 Maine, 251; Fitzhugh *v.* Maxwell, 34 Mich. 138; Beecher *v.* Beecher, 43 Conn. 556.

[4] Brown *v.* Vandergrift, 30 P. F. Sm. 142.

[5] The principle upon which relief in the case of defective execution of powers rests, is said by Mr. Adams (Doctrine of Equity, 98) to be that equity will recognise a meritorious consideration, and will complete gifts made on such a consideration in favor of a donor's intention after death. This is, perhaps, a philosophical statement of the principle; the cases, however, are ordinarily referred to the two heads under which they are treated in this work, viz., Accident and Mistake.

equities on the other side. Defects which are of the very essence of the power will not be relieved against, but mere formal defects will.

The powers here referred to are powers which have been created by way of use, and not bare authorities conferred by law.[1]

183. Besides the cases above stated, there are a number of miscellaneous instances in which equity will give relief on the ground of accident. Thus where an administrator or executor pays debts, legacies or distributive shares under the impression that the assets are sufficient for all demands, and it afterwards turns out, from unexpected occurrences, that the assets are insufficient; or an annuity is directed by will to be secured on public stock, and an investment is made, sufficient at the time, but afterwards rendered insufficient by action of parliament in reference to the stock; or where a testator cancels a former will upon the presumption that a later will, made by him, is duly executed, when it is not; or when boundaries have been accidentally confused; or there has been an accidental omission to endorse a promissory note; in all of the above cases, and, indeed, it may be safely said, in *any* case of accident, where the party injured has not been in default, and the party on the other side has no special equity to protect him, a court of chancery will give relief suited to each particular case, subject to the general rules already stated.[2]

184. Having noticed that head of equitable jurisdiction which has been termed "Accident," the next subject requiring consideration is that of Mistake.

The jurisdiction of chancery to correct mistakes in deeds, was assumed at a very early day.[3] The reason for its exercise was twofold: first, because of the implied credit which courts of law gave to the seal of a party unless fraud was proved; and second, because all the relief which a court of law could possibly afford, would be to treat the instrument as a nullity, in which case the intention of the parties would, after all, be defeated in many instances; whereas in equity the instrument could be *reformed*, and relief granted upon the instrument when so corrected in

[1] See Bright *v.* Boyd, 1 Story, 478.

[2] Story's Eq. Jurisp., § 90 *et seq.*

[3] 1 Spence, 634.

the same manner as if it had been made perfect in the first instance,[1] and the true meaning of the parties to a transaction could thus be expressed and carried out.

This reference to the superiority of the equitable *remedy* in cases of mistake naturally leads to the remark that at present the only points to be considered are those which relate to the *nature* of mistakes, their different kinds, the circumstances under which equity will afford relief, and the occasions which most frequently arise for the interposition of the chancellor. The *character* of the remedy afforded will be attempted to be explained and discussed in the chapter on Reformation and Cancellation.[2]

185. A mistake exists when a person, under some erroneous conviction of law or fact, does, or omits to do, some act which but for the erroneous conviction he would not have done or omitted.[3] It may arise either from unconsciousness, ignorance, forgetfulness, imposition or misplaced confidence.[4]

Where the mistake arises from imposition or misplaced confidence, relief may be had on the ground of fraud. Where it arises from unconsciousness, ignorance or forgetfulness, no element of fraud exists, and redress must be obtained, if obtained at all, on the distinct equitable basis of mistake.

186. The most natural division of the subject under consideration, and that which is usually made, is into Mistakes of Law, and Mistakes of Fact.

187. The general rule of the common law is that a mistake of law is no ground for relief.[5] This principle, which is one familiar to all systems of jurisprudence, is, in the common law, embodied in the maxim "*Ignorantia legis neminem excusat.*" As a general rule the same principle may be said to exist in equity;[6] but of

[1] Ballance *v.* Underhill, 3 Scam. 459; Willis *v.* Henderson, 4 Id. 18; Fireman's Ins. Co. *v.* Powell, 13 B. Mon. 314; Shelby *v.* Smith, 2 A. K. Marsh. 504; Ring *v.* Ashworth, 3 Cole, (Ia.) 452. See *post* § 470, as to how far this will be done in parol contracts affecting realty.

[2] *Post*, Part III., Chap. III.

[3] Haynes's Outlines of Equity, 132.

[4] Kerr on Fraud and Mistake, 396; Story's Eq., § 110.

[5] Manser's Case, 2 Coke, 3 b.

[6] Hunt *v.* Rousmanier's Adm'r., 8 Wheat. 174; 1 Peters, 1; 1 Am. Lead. Cas. 700; Rogers *v.* Ingham, L. R., 3 Ch. D. 351 (and see particularly the remarks of James, L. J., on p. 356, and of Mellish, L. J., on page 357); Champlin *v.* Laytin, 18 Wend. 407; Shot-

late years the disposition of courts and text writers seems to be to qualify the proposition by many exceptions; and no little difference of opinion, perhaps, exists as to whether it can now even be asserted as a general rule.[1] Perhaps a correct statement of the doctrine, as at present received, would be to say, that the maxim *ignorantia juris non excusat* is not of universal applicability in equity. The distinction has been taken between the word *jus* as used to indicate general law, and the same word as employed to denote private right.[2] In the former sense a mistake as to the general law is irremediable in equity, as well as at law; in the latter, a mistake in regard to individual rights may under certain circumstances be redressed.[3] And this distinction may go far to reconcile the cases. Thus, an instance of the first class may be found in the leading case of Hunt *v.* Rousmanier's Executors, where the law upon this subject was most thoroughly discussed in the Supreme Court of the United States.[4] In that case a power of attorney to execute a bill of sale of a ship was taken by a creditor from a debtor, under the distinct impression, induced by the advice of counsel, that it would be as valid a security, under all circumstances, as a mortgage. The debtor subsequently died, and as the power of attorney was revoked by his death, the security of the creditor was

well *v.* Murray, 1 Johns. Ch. 512; McMurray *v.* St. Louis Co., 33 Mo. 377; Peters *v.* Florence, 2 Wright, (Pa.) 194; Gwynn *v.* Hamilton, 29 Alab. 233; Rankin *v.* Mortimere, 7 Watts, 372; Good *v.* Herr, 7 W. & S. 253; Meckley's Estate, 8 Harris, (Pa.) 478; Gross *v.* Leber, 11 Wright, (Pa.) 520; Menges *v.* Oyster, 4 W. & S. 20; McAninch *v.* Laughlin, 1 Harris, (Pa.) 371; Glenn *v.* Statler, 42 Ia. 107; Carpenter *v.* Jones, 44 Md. 625; Mills *v.* Miller, 2 Woolw. (Neb.) 299; Smith *v.* McDougal, 2 Cal. 586; State *v.* Reigart, 1 Gill, 1; Mellish *v.* Robertson, 25 Vt. 603; State *ex rel v.* Britton, 102 Ind. 214; Goltra *v.* Sanasack, 53 Ill. 456; Lyon *v.* Sanders, 23 Miss. 530; Dill *v.* Shahan, 25 Alab. 694; Wintermute *v.* Snyder, 2 Green Ch. 498; Hampton *v.* Nicholson, 8 C. E. Green, 427; Trigg *v.* Read, 5 Hump. 529; Storrs *v.* Barker, 6 Johns. Ch. 166; Freeman *v.* Curtis, 51 Me. 140; Brown *v.* Armistead, 6 Rand. 594; Fergerson *v.* Fergerson, 1 Geo. Dec. 135; Hoover *v.* Reilly, 2 Abb. (U. S.) 471; see Worley *v.* Tuggle, 4 Bush, 168; Midland Great Western Ry. Co. of Ireland, 6 H. L. Cas. 798.

[1] See Story's Eq. 138 a to 138 i. See Ledyard *v.* Phillips, 32 Mich. 13.

[2] Cooper *v.* Phibbs, L. R., 2 H. L. Cas. 170; see also, Beauchamp *v.* Winn, 6 Eng. & Ir. App. Cas. 234; and Jones *v.* Clifford, L. R., 3 Ch. Div. 779; Kerr on Fraud and Mistake, 398 (Bump's ed.).

[3] See Matlock *v.* Glover, 63 Tex. 231.

[4] 8 Wheat. 174; 1 Peters, 1, 3, 14. Also, Zollman *v.* Moore, 21 Grat. 320; Broadwell *v.* Broadwell, 1 Gilm. 599.

invalidated. It was held that the misapprehension of the parties as to the legal effect of the instrument was no ground for relief; and it was said that it would be unprecedented for a court of equity to decree another security to be given under such circumstances.

So, in Rogers *v.* Ingham,[1] an executor acting on the advice of counsel on the construction of a will, proposed to divide a fund between two legatees in certain proportions. One of the legatees being dissatisfied, took the opinion of counsel, which agreed with the former opinion. The executor then divided and paid over the fund in accordance with the opinions. The dissatisfied legatee afterwards filed a bill alleging that the will had been mistakenly construed, but it was held that the mistake afforded no ground for relief.

On the other hand, where the eldest of three brothers divided lands, of which the second brother had died seised, with the youngest, under the mistaken impression, confirmed by a friend of both parties who had been consulted, that land could not ascend, and that he was not, therefore, his brother's heir, it was held that he was entitled to relief.[2] This case has been much criticized;[3] but it, and similar decisions, may perhaps be reconciled with cases like Hunt *v.* Rousmanier on the principle already stated.

188. But whether equity will or will not interfere in the case of a pure mistake of law, and whatever may be the true distinction to be taken between the cases, it is nevertheless clear that any additional circumstances will readily be laid hold of by the court, as constituting sufficient grounds for interposition. Thus, where ignorance of the law exists on one side, and that ignorance is known and taken advantage of by the other party, the former will be relieved. More particularly will this be so if the mistake was encouraged or induced by misrepresentation of the other party.[4]

[1] L. R., 3 Ch. 351.

[2] Landsdown *v.* Landsdown, Mosley, 364. See, also, Eaglesfield *v.* Marquis of Londonderry, L. R., 4 Ch. D. 693; Thompson *v.* Eastwood, L. R., 2 App. Cas. 215; and Shear *v.* Robinson, 18 Fla. 379.

[3] Hunt *v.* Rousmanier, 1 Peters, 14, 15; Story's Eq., § 125. But Chief Justice Marshall in Hunt *v.* Rousmanier, 8 Wheat. 215, said of Landsdown *v.* Lansdown, that "as a case in which relief has been granted on a mistake in law, it cannot be entirely disregarded." See also Bigelow *v.* Barr, 4 Ohio, 358; Williams *v.* Champion, 6 Id. 169.

[4] Scholefield *v.* Templer, Johns. Ch. 166; Cooper *v.* Phibbs, L. R., 2 H. L.

Relief is sometimes given also in cases of surprise—that is, where parties have entered into arrangements unadvisedly and improvidently, and without due deliberation.[1] So also in some cases where the law is confessedly doubtful, and one about which ignorance may well be supposed to exist.[2]

189. But *compromises* of doubtful rights are favored both in equity and at law, and no relief can be had if it afterwards turns out that the right surrendered was entirely valid and capable of assertion. It has been truly said that every compromise of a right necessarily implies that the party possesses *some* right which is surrendered; and he shall not, therefore, afterwards be heard to complain, if it subsequently appears that his right was more certain and well settled than it was at first supposed to be.[3] Family compromises, especially if they are made in good faith and with full disclosure, are favored in equity, and may be sustained by the court, "albeit, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between strangers."[4]

But while such a compromise is to be regarded with favor, yet when the party setting it up comes in to ask the *active* interference of a court of equity for its enforcement, relief will not be granted unless the case falls within the rules which regulate bills for specific performance. If the terms of the arrangement are unconscionable, or the evidence shows that the mind of the parties have not, in fact, come together, relief will be refused.[5]

Cas. 149; Whelen's App., 20 P. F. Sm. 425; Wheeler *v.* Smith, 9 How. 55; Metropolitan Bank *v.* Godfrey, 23 Ill. 579; Bryan *v.* Masterson, 4 J. J. Marsh. 225; Hardigree *v.* Mitchum, 51 Alab. 154; Balis *v.* Hunt, 77 Ind. 355; Kerr on Fraud and Mistake, 400.

[1] Pusey *v.* Desbouvrie, 3 P. Wms. 315; Evans *v.* Llewellyn, 2 Bro. C. R. 150; 1 Cox, 333.

[2] Cumberland Co. *v.* Sherman, 20 Maryl. 117; Champlin *v.* Laytin, 18 Wend. 407; Garner *v.* Garner, 2 Dess. 437; Freeman *v.* Curtis, 51 Maine, 140; Moreland *v.* Atchison, 19 Tex. 303; Green *v.* Morris R. R. Co., 1 Beas. 165; Martin *v.* N. Y. S. & C. R. R. Co., 36 N. J. Eq. 109; Haden *v.* Ware, 15 Alab. 149; Reservoir Co. *v.* Chase, 14 Conn. 123.

[3] Kerr on Fr. & M. 403: Trigg *v.* Read, 5 Humph. 529; Good *v.* Herr, 7 W. & S. 253; Taylor *v.* Patrick, 1 Bibb, 168; Durham *v.* Wadlington, 2 Strob. Eq. 258; Brandon *v.* Medley, 1 Jones Eq. 313; Bell *v.* Lawrence, 51 Alab. 160; Clifton *v.* Cockburn, 3 My. & K. 76; Bentley *v.* Mackay, 31 Beav. 143; note to Stapilton *v.* Stapilton, 3 Lead. Cas. Eq. 411.

[4] Westby *v.* Westby, 2 D. & War. 503, 525; Shartel's Appeal, 14 P. F. Sm. 25; Stub *v.* Lies, 6 Watts, 43; Burkholder's Appeal, 9 Out. 39; Wilen's Appeal, Id. 121.

[5] Wistar's Appeal, 30 P. F. Sm. 484.

It appears to be settled by the authorities that money paid under a mistake of law cannot be recovered back either in equity or at law.[1]

The court will not interfere where the parties cannot be restored to their original position, or where the rights of *bona fide* purchasers, without notice, have intervened.[2]

190. A mistake of fact is a mistake not caused by the neglect of legal duty on the part of the person making the mistake, and consisting in an unconsciousness, ignorance, or forgetfulness of a fact past or present, material to the transaction; or in the belief in the present existence of a thing material to the transaction which does not exist, or in the past existence of a thing which has not existed.[3]

The jurisdiction which a court of equity exercises for the purpose of correcting mistakes of fact is a very wide and general one, and may be said to exist (subject to the qualifications hereafter mentioned) in all cases in which there is not a complete remedy at law. The adequacy of the common-law remedy is probably the best test of the jurisdiction. Thus (to illustrate by two cases in Illinois) a bill has been sustained to correct a mistake in a master's deed in a foreclosure proceeding;[4] whereas relief in the case of an attachment bond has been refused—the legal remedy being adequate.[5]

The mistake may consist either in the circumstance that the instrument by which the parties designed to express their intention does not so express it, or does not express it accurately; or in the circumstance that the intention of the parties, though correctly expressed, has, nevertheless, been reached through some misapprehension or ignorance. In one case the intention is erroneously expressed; in the other the intention is founded on

[1] Kerr on Fraud and Mistake, 401, 402; Rogers *v.* Ingham, L. R., 3 Ch. D. 351, 356, 357; Currie *v.* Goold, 2 Mad. 164. See, also, R. R. Co. *v.* Soutter, 13 Wallace, 524; Bank of U. S. *v.* Daniel, 12 Peters, 32; Haven *v.* Foster, 9 Pick. 112; Pinkham *v.* Gear, 3 N. Hamp. 163; Hubbard *v.* Martin, 8 Yerg. 498; Ege *v.* Koontz, 3 Barr, 109; Miles *v.* Stevens, Id. 21; Jones *v.* Watkins, 1 Stew. 81; Clarke *v.* Dutcher, 9 Cow. 674.

[2] Kilpatrick *v.* Strizier, 67 Ga. 247; Lowe *v.* Allen, 68 Ga. 225; Cass Co. *v.* Oldham, 75 Mo. 50; Hewitt *v.* Powers, 84 Ind. 295; Kerr on Fr. & M. 436.

[3] Ibid. 406.

[4] Foster *v.* Clark, 79 Ill. 225; following De Reimer *v.* Cantillon, 4 Johns. Ch. 85. See, also, Roberts *v.* Taliaferro, 7 Iowa, 111; Ehlehringer *v.* Moriarity, 15 Id. 78.

[5] Craft *v.* Dickens, 78 Ill. 131. See Puterbaugh *v.* Elliott, 22 Ill. 157.

error. The relief pertinent to the first case is correction; to the second, rescission.[1]

Thus, where there was an agreement that part of the purchase-money of certain real estate should be paid by a judgment note for a certain sum "with interest," and the words "with interest" were omitted from the note by the mistake of the scrivener by whom it was written, it was held that this was such a mistake as equity would correct. The intention of the parties had not been accurately expressed.[2]

On the other hand, when there is a settlement of accounts made between parties, which correctly expresses their intention, but which is founded on error, the settlement will be set aside.[3] The appropriate relief in cases of mistake is sometimes solely in equity, and no action at law will lie. Thus, where a parcel of ten acres was omitted from a conveyance either through mistake or fraud, it was held that the purchaser might have the deed reformed or might reasonably rescind the contract, but could not sue in *assumpsit* to recover back a proportionate part of the price.[4]

[1] See Hurd *v.* Hall, 12 Wis. 112.

[2] Gump's Appeal, 15 P. F. Sm. 476. See, also, Talley *v.* Courtney, 1 Heisk. 715; Newcomer *v.* Kline, 11 Gill. & J. 457; Hathaway *v.* Brady, 23 Cal. 121; Russell *v.* Mixer, 42 Cal. 475; Keith *v.* Globe Ins. Co., 52 Ill. 518; Harrison *v.* Jameson, 3 J. J. Marsh. 232; Rigsbee *v.* Trees, 21 Ind. 227; Groff *v.* Rohrer, 35 Maryl. 327. See, also, Loss *v.* Obry, 7 C. E. Green, 52; Glass *v.* Hulbert, 102 Mass. 34; Stockbridge Iron Co. *v.* The Hudson Iron Co., Id. 48; Hamilton *v.* Asslin, 14 S. & R. 448; Gower *v.* Sterner, 2 Whart. 75; Farmers' and Drovers' Bank *v.* Fordyce, 1 Barr, 456; Chalfant *v.* Williams, 11 Casey, 212; Huss *v.* Morris, 13 P. F. Sm. 372; Scales *v.* Ashbrook, 1 Metcalfe (Ky.), 358; Worley *v.* Tuggle, 4 Bush, 168; Mills *v.* Lockwood, 42 Ill. 111; Waterman *v.* Dutton, 6 Wis. 265; Deford *v.* Mercer, 24 Iowa, 118; Smith *v.* Jordan, 13 Minn. 264; Doty *v.* Judson, 2 Root, 427; Gay *v.* Adams, 1 Id. 105; Bundy *v.* Sabin, 2 Id. 209; Willis *v.* Gattman, 53 Miss. 721; Beaumont *v.* Bramley, T. & R. 41; 1 Sug. V. and P. 262 (171). Such a mistake can properly be dealt with in equity alone. Long *v.* Hartwell, 34 N. J. 116, 128.

[3] Adams Eq. 384; McCrae *v.* Hollis, 4 Dessaus. 122; Waggoner *v.* Minter, 7 J. J. Marsh. 175; Barnett *v.* Barnett, 6 Id. 499; Monnin *v.* Beroujon, 51 Alab. 196; Stuart *v.* Sears, 119 Mass. 143; Russell *v.* The Church, 15 P. F. Sm. 9; Stines *v.* Hays, 36 N. J. Eq. 364. See, further, as to mistake, Leek *v.* Cowley, 10 S. & R. 176; Horbach *v.* Gray, 8 Watts, 492; Jenks *v.* Fritz, 7 W. & S. 201; Bishop *v.* Reed, 3 Id. 261.

[4] Rand *v.* Webber, 64 Maine, 191. If the omission were occasioned by fraud, an action of deceit would lie in such a case. Id.

191. The mistake, to be relieved against in equity, must be one that is mutual, material and not induced by negligence.[1] It must be mutual, if the complainant wishes to have the instrument *reformed* and not simply set aside, because equity cannot undertake to *reform* on the ground of the ignorance or misapprehension of *one* of the parties as to any facts, though it may rescind.[2] It is essential, as was said by the Supreme Court of Michigan in a recent case, that the mistake to be relieved against in equity, must be an error on both sides.[3] If, however, such ignorance or misapprehension was induced, or fraudulently taken advantage of, by the other party, relief will be administered, but obviously on different grounds.[4] Still less can a chancellor grant redress in a case where a party finds that his motives for entering into a contract were mistaken, or his expectations unfounded.[5] This is especially the case where the means of information are equally open to both parties;[6] or the subject-matter of the agreement is of a doubtful character.[7]

The mistake must be material, because the court will not interpose its extraordinary relief for slight errors in matters which are not of importance. As misrepresentation will not vitiate a contract unless it relates to something which is a material inducement to the party to act;[8] so a mistake will not justify a man in seeking equitable relief if it is a mistake relating to some

[1] See Paulinson *v.* Van Iderstine, 28 N. J. Eq. 306, for an illustration of the limitations upon the doctrine of relief in equity on the ground of mistake.

[2] Lyman *v.* United Ins. Co., 17 Johns. 377; Nevius *v.* Dunlap, 33 N. Y. 676; Cooper *v.* The Farmers' Ins. Co., 14 Wright, (Pa.) 299; Evarts *v.* Steger, 5 Oregon, 147. See, also, Bentley *v.* Mackay, 31 Beav. 151; Sawyer *v.* Hovey, 3 Allen, 331; Woodbury Savings Bank *v.* The Insurance Co., 31 Conn. 517; Diman *v.* Providence R. R. Co., 5 Rhode Island, 130; White *v.* C. Nat. Bank, 64 N. Y. 316; Mead *v.* Westchester Fire Ins. Co., 64 N. Y. 453; Morris *v.* Penrose, 38 N. J. Eq. 629; Sells *v.* Sells, 1 Dr. & Sm. 42; *post*, Part III., Chap. on Reformation and Cancellation.

[3] Ludington *v.* Ford, 33 Mich. 123.

[4] See Welles *v.* Yates, 44 N. Y. 525; Maher *v.* Hibernia Ins. Co., 67 Id. 285; Harding *v.* Egin, 2 Tenn. Ch. R. 39.

[5] A court, however, may, under such circumstances, refuse to lend its aid to the other party seeking specific performance. *Post*, Part III., Chap. I., § 376; Mays *v.* Dwight, 1 Norris, 462.

[6] See Western German Savings Bank *v.* Farmers' and Drovers' Bank, 10 Bush, 669; Story's Eq. Jurisp., § 150.

[7] Perkins *v.* Gay, 3 Serg. & Rawle, 327.

[8] See *post*, Chap. II.

trivial matter, which did not substantially influence his action.[1] It must be something which, if uncorrected, would tend to work injustice.[2]

A mistake will not be relieved against if it is the result of the party's own negligence,[3] or that of his attorney.[4] Thus if he has had a complete defence or remedy at law, he cannot if he has neglected to avail himself of it there, have any relief in equity.[5] And under the same head should be classed mistakes into which a party has fallen, because he has not made use of the means of inquiry which were open to him ;[6] as (for instance) where he has not taken the trouble to read the paper which he was executing.[7] Reasonable diligence, however, is all that is required, and a party will not be deprived of his right to equitable relief, simply because he has not exercised the highest possible degree of care.[8] Moreover, even negligence may not, in all cases, close the doors of chancery against a complainant; for if the position of the other party has not been changed in consequence thereof, relief may be granted.[9]

There can be no relief on the ground of mistake when the subject-matter of the contract is necessarily, and by its very nature, of a doubtful or uncertain kind.[10]

Nor will equity always relieve if a mistake has occurred in a family arrangement, designed to settle disputes and quiet titles. A family compromise, even if made under mistaken impressions as to facts, will not, generally, be disturbed. It is otherwise

[1] See McFerran *v.* Taylor, 3 Cranch, 281 (remarks of Ch. J. Marshall); Kerr on Fraud and Mistake, 408.

[2] Henderson *v.* Dickey, 35 Mo. 120.

[3] Duke of Beauford *v.* Neeld, 12 Cl. & Finn. 248, 286; Leuty *v.* Hillas, 2 DeG. & J. 110; Susquehanna Mut. Fire Ins. Co. *v.* Swank, 102 Pa. St. 17. Western R. R. Co. *v.* Babcock, 6 Met. 346; Ferson *v.* Sanger, 1 Wood & Min. 138; Wood *v.* Patterson, 4 Md. Ch. 335; Diman *v.* Providence Rd. Co., 5 R. I. 130; Haggerty *v.* McCanna, 25 N. J. Eq. 48; Dillett *v.* Kemble, Id. 66; Voorhis *v.* Murphy, 26 Id. 434; Heath *v.* Jones, 12 Ill. App. 493; Lamb *v.* Harris, 8 Geo. 546; Iverson *v.* Wilburn, 65 Ga. 103; Smith *v.* Wheeler, 58 Iowa, 659; Lewis *v.* Lewis, 5 Oregon, 169.

[4] Heath *v.* Jones, 12 Ill. App. 493.

[5] Stephenson *v.* Wilson, 2 Vern. 325.

[6] See Kerr on Fraud and Mistake, 407; Hill *v.* Bush, 19 Ark. 522; Penny *v.* Martin, 4 Johns. Ch. R. 566; Butman *v.* Hussy, 30 Maine, 263; Juzan *v.* Toulmin, 9 Alab. 662.

[7] Glenn *v.* Statler, 42 Iowa, 110.

[8] Snyder *v.* Ives, 42 Iowa, 162.

[9] Mayer *v.* The Mayor, 63 N. Y. 455.

[10] Mortimer *v.* Capper, 1 Bro. C. C. 156; Ridgway *v.* Sneyd, Kay, 627; Baxendale *v.* Seale, 19 Beav. 601.

with compromises between strangers; for these, if based upon a mistake of fact, will be set aside.[1]

192. The occasions which call for the interposition of equity on the ground of mistake are, of course, very numerous, and it would not be possible, even if it were desirable, to enumerate them all without, in fact, giving a digest of the reported decisions under this head. There is, however, one class of cases in which the equitable doctrine is of an anomalous character, and requires particular notice, and that is the defective execution of powers. This subject was referred to under the head of accident; and it is well established that in the case of mistake, as well as in that of accident, equity will relieve against certain defects in the execution of a power in favor of certain persons and as against others, if these latter do not stand in an equally meritorious position. It will be observed that the above statement naturally suggests the questions—first, what defects may be remedied; secondly, for whose benefit; and thirdly, as against whom?

193. And, first, what defects may be remedied? Equity will not interfere in the case of a *non execution* of a power. It will correct defects in an attempted execution; but it will not supply an execution if none has been attempted.[2] The reason for the distinction is obvious. The jurisdiction which equity has assumed to aid in the *defective* execution of powers is based upon the theory that the donee of the power has *intended* to exercise it, but has been prevented from doing so by some accident or mistake;[3] and equity will not, in such a case, suffer a substantial intention to be defeated for the sake of a mere form. But where there has been no exercise of the power at all, no intention to exercise it can be presumed; and, therefore, the ground for the interference of the chancellor does not exist.

The defects which will be aided in equity are of two kinds—first, where there has been an instrument executed from which an intention to exercise the power may be inferred, but the

[1] Stockley *v.* Stockley, 1 V. & B. 23; Kerr on Fraud and Mistake, 434.

[2] Johnson *v.* Cushing, 15 N. Hamp. 298; Howard *v.* Carpenter, 11 Maryl. 259; Wilkinson *v.* Getty, 13 Iowa, 157. See Norcum *v.* D'Œnch, 17 Missouri, 98. Note to Tollet *v.* Tollet, 1 Lead. Cas. Eq. 381 (4 Am. ed.).

[3] Barr *v.* Hatch, 3 Ohio, 527.

instrument itself is informal or inappropriate;[1] and, second, where there has been a defective execution of a formal and appropriate instrument.

Of the first class of defects the leading case of Tollet *v.* Tollet is an illustration There, a power existed to make a jointure by deed. It was, in fact, made by will. It was, nevertheless, held that this exercise of the power was good.[2] So equity will lend its aid in many other cases in which the instrument is inappropriate, provided, always, there is a sufficient indication of the intention to exercise the power.[3]

Of the second class of defects which will be aided in equity, familiar instances are found in those cases in which the instrument by which the power is to be exercised is required to be executed in the presence of a certain number of witnesses, and is actually executed in the presence of a smaller number; or in which it is required to be signed and sealed, and sealing is omitted.[4] The rule will apply to any case in which there is an appropriate instrument, but in the execution of which there has been, through accident or mistake, some informality.

194. In the second place, in considering the question, "for whose benefit will equity lend its aid," it may be stated as a general rule, that mere volunteers will not be assisted, but that aid will be given to purchasers for value, mortgagees, lessees[5] (for mortgagees and lessees are purchasers *pro tanto*), creditors,[6]

[1] See in re Dykes' Estate, L. R., 7 Eq. 337; note to Tollet *v.* Tollet, 1 Lead. Cas. Eq. 234 (4th Eng. ed.).

[2] While a power of appointment by deed is well exercised by will, the converse is not the case, and a power to appoint by will cannot be exercised by deed. The reason of this, is that the donor of the power, in the latter case, is supposed to intend that the power shall be ambulatory during the life of the donee of the power, and that as this intention would be defeated by the execution of a deed, the power must be strictly pursued, and can be exercised only by will.

[3] Garth *v.* Townsend, L. R., 7 Eq. 220.

[4] See Morse *v.* Martin, 34 Beav. 500; Notes to Tollet *v.* Tollet, 1 Lead. Cas. Eq. 234 (365, 4th Am. ed.).

[5] Thorp *v.* McCullum, 1 Gilm. 615; Beatty *v.* Clark, 20 Cal. 11; Love *v.* The Sierra Nevada Mining Co., 32 Id. 653; Affleck *v.* Affleck, 3 Sm. & Giff. 394; In re Dyke's Estate, L. R., 7 Eq. 337; Taylor *v.* Wheeler, 2 Vern. 564; Jennings *v.* Moore, Id. 609; Campbell *v.* Leach, Ambl. 740; Shannon *v.* Bradstreet, 1 Schoales & Lefroy, 62; Dowell *v.* Dew, 1 Y. & C. C. C. 345; King *v.* Roney, 5 Ir. Ch. R. 64. See also Hout *v.* Hout, 20 Ohio, N. S. 119.

[6] Bixby *v.* Eley, 2 Bro. C. C. 325; Wilkes *v.* Holmes, 9 Mod. 485.

and persons who have a meritorious standing.[1] In this last class are included a charity,[2] a wife and a legitimate child, but none others.[3] Thus, the execution of a power will not be aided in favor of a husband,[4] an illegitimate child, a grandchild, a father, a mother, brother or sister, a nephew or niece, a cousin, or a settlor defectively executing a power in his own favor.[5] In some rare cases, however, equity will lend its aid even in favor of a volunteer; as, for instance, when the due execution of a power has become impossible.[6]

195. In the third place, equity will aid the defective execution of a power against a remainder-man, and also, in general, against the heir-at-law. Whether it will be aided as against an heir-at-law who is unprovided for, seems to be still undecided. It will not be aided against a *bona fide* purchaser for value.[8]

Equity will not lend its aid if the intention of the donor of the power will thereby be defeated. This is the reason why a power required to be exercised by will, cannot be duly exercised by deed.[9]

The equity under consideration will, it seems, be only exercised in favor of the intention of the donee of the power after his death. It will not be exercised in support of a conveyance *inter vivos*—except in the case of a purchaser for value. This seems to follow from the rule in regard to supplying surrenders of copyholds, which stands precisely on the same footing as the equity in regard to aiding defective execution of powers, and is governed by the same rules.[10]

As to the question of what powers will be aided, it may be sufficient to remark generally that they are those created by way of use as distinguished from bare authorities conferred by

[1] 1 Lead. Cas. Eq. 229 (4th Eng. ed.); note to Tollet *v.* Tollet; Schenck *v.* Ellingwood, 3 Edw. Ch. 175.

[2] Pepper's Will, 1 Pars. Eq. 436, 446, 451.

[3] See Porter *v.* Turner, 3 Serg. & R. 114; Dennison *v.* Goehring, 7 Barr, 175.

[4] Breit *v.* Yeaton, 101 Ill. 242.

[5] 1 Lead. Cas. Eq. 231, 232. See, however, Huss *v.* Morris, 13 P. F. Sm. 367.

[6] Kerr on Fraud and Mistake, 444.

[7] 1 Lead. Cas. Eq. 233.

[8] Kerr on Fraud and Mistake, 443.

[9] Id. 442.

[10] The jurisdiction to supply surrenders of copyholds is no longer of importance. The cases upon the subject are, however, applicable to the subject of powers.

law. Acts done under authorities of this latter kind—as, for example, leases or conveyances by a tenant in tail—are only binding when regular and complete.[1]

While it is true, as a rule, that equity will not supply the non-execution of a power, it must be remembered that this will not apply to that particular class of powers (which have been already discussed) known as powers in trust. The exercise of such powers is obligatory; and, as has been explained in a former chapter, the non-execution by the donee is never allowed to defeat the intention of the settlor, or disappoint the beneficiaries for whose advantage the powers were created.

196. Equity has jurisdiction to correct mistakes in awards, where the mistake appears on the face of the award, or is disclosed by some contemporaneous writing, or if the arbitrator voluntarily admit a mistake, or state circumstances which show clearly that the proceedings have been erroneous; but not otherwise.[2]

Equity has jurisdiction to correct mistakes in wills when they are apparent on the face of the will, or are made out by a due construction of its terms.[3]

Equity will not grant relief in cases of mistake except upon very clear evidence. Where it is admitted in the answer, there can, of course, be little difficulty in granting relief; but where the fact of mistake is denied in the answer, evidence to overcome such denial must be of the most persuasive character.[4]

[1] Kerr on Fraud and Mistake, 331.

[2] Id. 447, 448; Roosevelt *v.* Thurman, 1 Johns. Ch. 225.

[3] Id. 448; 1 Story's Eq. Jurisp., §§ 179, 183. See Mellish *v.* Mellish, 4 Ves. 45; Grimes *v.* Harmon, 35 Ind. 208; Davis v. Henry, 121 Mass. 150.

[4] Kennard *v.* George, 44 N. Hamp. 440; Canedy *v.* Marcy, 13 Grey, 373; Beardsley *v.* Knight, 10 Verm. 185; Tripp *v.* Hasceig, 20 Mich. 263; Care *v.* Peters, Id. 298; Burgin *v.* Gilberson, 11 C. E. Green, 77; Ludington *v.* Ford, 33 Mich. 123; Getman's Ex'rs. *v.* Beardsly, 2 Johnson Ch. 274; Lyman *v.* United Ins. Co., Id. 630; Ludington *v.* Ford, 33 Mich. 123; Lewis *v.* Lewis, 5 Oregon, 169; Hamlin *v.* Sullivant, 11 Ill. App. 423.

CHAPTER II.

FRAUD.

SECTION I.

GENERAL NATURE OF FRAUD; ACTUAL FRAUD.

197. Importance and general nature of equitable jurisdiction in cases of Fraud.
198 Distinctions between the relief at law and in equity.
199. Limitations upon the jurisdiction of equity in cases of Fraud; Fraud in obtaining a will; *Allen* v. *M'Pherson*.
200. Concurrent jurisdiction of equity.
201. Exclusive jurisdiction.
202. Fraudulent transactions voidable, not absolutely void.
203. Within what time redress must be sought.
204. Fraudulent transactions must be adopted or set aside *in toto*.
205. General division of the subject of Fraud.
206. General nature of actual fraud.
207. Matters of opinion.
208. Prospectuses of projected companies; *Central Railway Co.* v. *Kisch*.
209. Puffing; *Mortimer* v. *Bell*.
210. Fraud on owner of property sold at auction.
211. Matters of intention.
212. Matters of law.
213. *Suppressio veri*.
214. Knowledge of the truth or falsehood by party making the representations; classification of cases on this subject.
215. Representation must be relied on.
216. Representation must be material; *dolus dans locum contractui*.
217. Party deceived must be injured; representations by agents.
218. Trustees *ex maleficio*.

197. THE subject of the present chapter is that head of jurisdiction which, perhaps, more than any other in the whole range of the jurisprudence of chancery, has called forth the beneficial exercise of the powers of courts of equity. From the earliest times down to the present day, the wrongs inflicted by *covin* (to use the ancient term) have appealed with peculiar force to the conscience of chancellors; and probably no field of remedial law has more extended boundaries, or has yielded more substantial fruits of justice, than that which, in equity jurisprudence, is embraced under the title of Fraud.

While the general signification of this word (fraud) is easily understood, and, indeed, requires no explanation, it is, nevertheless, difficult to give any satisfactory definition of it in a single sentence, for the simple reason that courts of equity have always avoided circumscribing the area of their jurisdiction in such cases by precise boundaries, lest some new artifice, not thought of before, might enable a wrongdoer to escape from the power of equitable redress. "The court," said Lord Chancellor Hardwicke, in Lawley *v.* Hooper,[1] decided in 1745, "very wisely hath never laid down any general rule beyond which it will not go, least other means for avoiding the equity of the court should be found out."

198 Fraud in equity has a wider signification than it has at law. It is true that at common law fraud is said to vitiate all transactions; rendering not only contracts, but even the most solemn acts, as, for example, the judgments of the courts, liable to be avoided.[2] Hence there exist many remedies at law for the purpose of redressing injuries inflicted through fraud.[3] Such is the action of deceit; the action on the case for fraudulent misrepresentations; and all actions based on the theory of the rescission of contracts on the ground of fraud, such as suits to recover purchase-money paid, or to get back goods delivered. In many instances, a party to a transaction tainted by fraud may elect to rescind it, and recover, at law, anything of value with which he may have parted on the faith of it. A familiar illustration of the right to bring a common-law action for fraudulent representation, is furnished by the action brought for falsely representing a third party to be solvent, and thereby inducing the plaintiff to trust his money or his goods with the party as to

[1] 3 Atkyns, 278.

[2] See Kincaid *v.* Conly, Phillips Eq. 270; Grantham *v.* Kennedy, 91 N. C. 148; Riegel *v.* Wood, 1 Johns. Ch. 402. But the fraud must be *actual*, not merely *constructive;* Patch *v.* Ward, L. R., 3 Ch. App. 207. A private statute may be relieved against when obtained on "false suggestions," 2 Black. Com. 346; but not "a public act." See Tyson *v.* School Directors, 1 P. F. Sm. 14; Beegle *v.* Wentz, 5 Id. 374; Stark *v.* McGowen, 1 Nott & McC. 397, note; Derby Turnpike Co. *v.* Parks, 10 Conn. 539. Consult Rand. *v.* Webber, 64 Maine, 191.

[3] The acknowledgment of a married woman to a deed may be avoided by proof of a fraud or duress; McCandless *v.* Engle, 1 P. F. Sm. 313 and cases cited; except as against a *bonâ fide* purchaser without notice; Hall *v.* Patterson, Id. 289.

whose solvency he is thus deceived by the defendant.[1] The defendant, in such a case, can be held responsible in a common-law action. Actions based on the rescission of contracts are also of very frequent occurrence; as, for example, where a vendor delivers goods which are different in kind from those which he contracted to deliver, the purchaser may return the goods and recover the purchase-money in an action for money had and received.[2]

Common-law actions, however, do not touch every imaginable description of fraud, and the relief which they afford is, in many cases, entirely inadequate; whereas equity takes cognisance of every possible kind of fraud,[3] even where the guilty party might be supposed to be protected by a disability, such as coverture,[4] and its remedies are of the most complete and searching character.

Thus equity will enjoin a party from enforcing an executory agreement; or it will order an executed agreement to be rescinded; and in each of these cases the evidence of the agreements may be ordered to be delivered up to be cancelled.[5] Or, if the surrender of a valuable right has been procured by fraud, and the document which is the evidence of that right has been cancelled, equity will declare the existence of the right and re-establish the document.[6] Moreover, equity, in proper cases, may compel a party to make good his representations,[7] or may order

[1] Pasley *v.* Freeman, 2 Smith's Lead. Cas. 92. See 1 Spence Eq. 622. Actions of deceit and for false representations are in the nature of equitable actions. Gwinther *v.* Gerding, 3 Head. 301. If a deed is falsely read to an illiterate person, it will be avoided at law. Bigelow on Fraud, 326. See as to Fraud in Equity, Story, § 62 and notes.

[2] See notes to Chandelor *v.* Lopus, 1 Sm. Lead. Cas. 299. See also Farris *v.* Ware, 60 Maine, 484.

[3] Except in cases of fraud in obtaining a will, where the common-law courts have jurisdiction if the subject matter is realty, and the ecclesiastical courts, if it is personalty. See Kerr on Fraud and Mistake, 44 (Bump's ed.); Allen *v.* M'Pherson, 1 H. L. Cas. 101, *post*, page 256 *et seq.* It must be remembered also that equity has no cognisance of frauds as *crimes;* it looks at them only in a *civil* point of view. Goldsmith's Doct. of Equity, 109.

[4] See Vaughan *v.* Vanderstegen, 2 Drewry, 379; Harvey's Estate (Godfrey *v.* Horton), L. R., 13 Ch. D. 216; Hodgson *v.* Williamson, L. R., 15 Ch. D. 89; Schmitheimer *v.* Eisman, 7 Bush, 299.

[5] See Relf *v.* Eberly, 23 Iowa, 467; Jones *v.* Bolles, 9 Wallace, 369.

[6] Tabor *v.* Mich. Mut. Life Ins. Co., 44 Mich. 324.

[7] "He who sells property on a description given by himself is bound to make good that description." Marshall, C. J., in McFerran *v.* Taylor, 3 Cranch, 270; and see McCall *v.* Davis, 6 P. F. Sm. 435; Pearson *v.* Morgan, 2 Bro. Ch. 385; Bacon *v.* Bronson, 7 Johns. Ch. 194; Evans *v.* Bicknell, 6 Ves. 174; Story's Eq. Jur., § 193.

a security which has been taken in too large an amount to stand good for what is actually due thereon;[1] or, in rescinding a contract, it may make allowances for improvements or deteriorations; or it may order bonds of indemnity to be given by either party. Equity aims, in fact, at that kind of relief which was known in the Roman law as *restitutio in integrum*.[2]

Moreover, in cases of this character the general principle is that he who seeks equity must do equity; and the party against whom the relief is sought must, therefore, also be remitted to the position he occupied prior to the transaction complained of. The court proceeds on the principle that as the transaction ought never to have taken place the parties are to be placed, as far as possible, in the situation in which they would have stood if there had never been any such transaction.[3] Besides, whenever the legal title is obtained by fraud, equity will not allow the fraudulent party to hold the beneficial interest, but will consider him as a trustee for the injured party. This is one of the most usual means which equity adopts for the purpose of correcting fraud; so much so, indeed, that in certain cases of fraud the injured party is treated as having an *equitable estate* in the property of which he has been defrauded. Thus, where a conveyance was made by a client to his solicitor, and the former had a right in equity to set the transaction aside, it was held that this was not a mere *right*, but an *estate* which was devisable.[4]

In all these cases, the remedies afforded by equity are manifestly superior to those of the common law, and are, indeed, of such a character as would be impossible to be reached through the medium of common-law forms.

When, to these remedies, we add the engine of discovery, the power of reaching the defendant's conscience, and getting at fraudulent intentions, in their most secret hiding places, we can

[1] Neilson *v.* McDonald, 6 Johns. Ch. 210; Potter *v.* Gracie, 58 Alab. 308; Proof *v.* Hines, Cas. temp. Talb. 111; Gould *v.* Okeden, 4 Bro. P. C. 198. See Logue's Appeal, 104 Pa. St. 136.

[2] 1 Spence Eq. 622.

[3] Bellamy *v.* Sabine, 2 Phillips, 425; Savery *v.* King, 5 H. L. Cas. 627; W. B. of Scotland *v.* Addie, L. R., 1 Sc. App. Cas. 162; Gatling *v.* Newell, 9 Ind. 572; Johnson *v.* Jones, 13 Sm. & M. 580; Neblett *v.* MacFarland, 2 Otto, 103; Kerr on Fraud, 335, 343. See, also, Grymes *v.* Sanders, 3 Otto, 62; and Gould *v.* Cayuga Nat. Bank, 99 N. Y. 333.

[4] See Gresley *v.* Mousley, 4 De G. & J. 78; Stump *v.* Gaby, 2 De G., M. & G. 623.

see how much superior the redress afforded in chancery must be to that given by a purely common-law tribunal.

The *methods* of relief in chancery will be considered in that portion of this treatise which is devoted to equitable remedies. What we are now concerned with is the extent and nature of the jurisdiction which equity assumes in such cases.

199. It was stated above that equity takes cognisance of every possible kind of fraud. This general remark must be subject to two qualifications. In the first place, it is now settled that equity has no jurisdiction in cases of fraud used in obtaining a will. So far as the will concerns real estate, its validity must be tested in the common-law courts; so far as personalty is involved, courts of probate have jurisdiction.[1] The question was examined, a few years ago, in the Supreme Court of the United States, and the ruling in Allen *v.* McPherson, in the House of Lords, was approved and followed. The rule was recognised as general and well settled both in this country and in England.[2] Where, however, a particular devise or bequest has been obtained through representation and promises that it would be used for the benefit of another, equity will prevent a fraud by treating the devisee or legatee as a trustee for the party intended to be benefited.[3]

[1] There are one or two early authorities the other way. See Maundy *v.* Maundy, 1 Ch. R. 66; Goss *v.* Tracy, 1 P. Wms. 287; Welby *v.* Thornagh, Pr. Ch. 123. But the doctrine stated in the text has been established for many years. See Kerrich *v.* Bransby, 7 Bro. P. C. 437; Bennett *v.* Vade, 2 Atk. 324; Allen *v.* M'Pherson, 1 H. L. Cas. 191; Jones *v.* Gregory, 2 De G., J. & Sm. 87; Tarver *v.* Tarver, 9 Pet. 180; Gaines *v.* Chew, 2 How. 645; Adams *v.* Adams, 22 Verm. 50; Colton *v.* Ross, 2 Paige, (Ch.) 396; Hamberlin *v.* Terry, 7 Howard, (Miss.) 143; Ewell *v.* Tidwell, 20 Ark. 136; Blue *v.* Patterson, 1 Dev. & Bat. Eq. 457; Hunt *v.* Hamilton, 9 Dana, 90; McDowall *v.* Peyton, 2 Dessaus. 313 (where, however, the court decreed that the defendant should consent to a revocation of the probate); Burrow *v.* Ragland, 6 Hump. 481. See, also, Waters *v.* Stickney, 12 Allen, 1; Watson *v.* Bothwell, 11 Alab. 650; Trexler *v.* Miller, 6 Ired. Eq. 248; and Perry on Trusts, § 182.

[2] Case of Broderick's Will, 21 Wal. 503; California *v.* McGlynn, 20 Cal. 233, 266.

[3] Hoge *v.* Hoge, 1 Watts, 213; McCormick *v.* Grogan, L. R., 4 H. L. 91, where the rule is clearly stated by Lord Westbury. See, also, Chamberlaine *v.* Chamberlaine, 2 Freem. 34; Rockwood *v.* Rockwood, 1 Leon. 192; Cro. Eliz. 164; Devenish *v.* Baines, Prec. Ch. 4; Jones *v.* McKee, 3 Barr, 496; 6 Id. 428; Irwin *v.* Irwin, 10 Casey, 525; Church *v.* Ruland, 14 P. F. Sm. 442; Gaither *v.* Gaither, 3 Maryl. Ch. 158; Perry on Trusts, § 181.

200. In the second place, it is to be observed that while, as a general rule, courts of equity have jurisdiction in *all* cases of fraud, they will not ordinarily exercise this jurisdiction if there is a full and adequate remedy at law.[1] No one, for instance, would think of filing a bill in equity in a case of a fraudulent warranty on the sale of a horse, or of a deceit in the sale of a bale of goods.[2] Even where the jurisdiction of courts of chancery is limited to cases in which there is no "plain, adequate and complete remedy" at law (as is the case with the federal courts, for example[3]), this provision has been held to be declaratory merely, and the jurisdiction thus conferred is to be measured by the same standard as that of ordinary courts of chancery.[4] So far, however, as the general jurisdiction of chancery is concerned, and apart from statutory limitations, the better opinion would seem to be that the cognisance of every case of fraud, with the single exception of fraud in obtaining a will, belongs to the court of chancery even though there may be a complete remedy at law. The jurisdiction in such a case is concurrent. This is the opinion of Lord Eldon, Chancellor Kent and Mr. Spence.[5] The true conclusion would appear to be that equity would have the *power* to entertain a bill in such cases, but that it is not according to the usual course and practice of chancery to do so. Where, however, the remedy at law is not full and adequate, the jurisdiction of chancery in cases of fraud is undoubted; and where from any circumstance whatever, as for mere discovery alone, chancery has once obtained jurisdiction, it will go on and do complete justice in the case.

[1] Newham *v.* May, 13 Pri. 749; Russell *v.* Clark, 7 Cranch, 69. See, also, Piscataqua Ins. Co. *v.* Hill, 60 Maine, 183; Hackley *v.* Draper. 60 N. Y. 88; Woodman *v.* Freeman, 25 Maine, 531; though see Clark *v.* Robinson, 58 Id. 137. See, also, Life Association of Scotland *v.* McBlain, L. R., 9 Irish Ch. 176; Hoare *v.* Bremridge, L. R., 14 Eq. 522; 8 Ch. 22; Hardwick *v.* Forbes, 1 Bibb, 212; Boardman *v.* Jackson, 119 Mass. 161; Williams *v.* Mitchell, 30 Alab. 299; Learned *v.* Holmes, 49 Miss. 290; White *v.* Boyce, 21 Fed. Rep. 228.

[2] Newham *v.* May, 13 Price, 751-2. See Buzard *v.* Houston, 119 U. S. 347.

[3] The Judiciary Act of 1789.

[4] Boyce's Ex'rs. *v.* Grundy, 3 Peters, 215; Oelrichs *v.* Spain, 15 Wallace, 228. See Clark *v.* Robinson, 58 Me. 137, and *ante*, p. 21.

[5] See Evans *v.* Bicknell, 6 Ves. 182; Bacon *v.* Bronson, 7 Johns. Ch. 201; 1 Spence, 625. See dissenting opinion of Bradley, J., in Buzard *v.* Houston (*ante*), and page 55, *ante*.

201. As the jurisdiction of equity embraces (with the qualifications already stated) fraud of all kinds, it affords relief in many instances in which no grounds for redress whatever exist at law. In such cases, therefore, its jurisdiction is exclusive, and the only remedy which the injured party can have is by bill in chancery.[1] Thus, a great many transactions are *presumed* to be fraudulent in equity which are not so in law, where the rule is that fraud must be proved, and cannot be presumed. In equity fraud may be *inferred* from attendant circumstances;[2] it may be presumed from the subject-matter of the contract, or from the relations of the parties; or it may afford grounds for relief when it simply affects third persons not parties to the transaction. All of these heads will be considered in detail; but before doing so, it will be well to notice one or two general principles which courts of chancery have laid down in regard to frauds of all kinds.

202. And, in the first place, transactions tainted with fraud are not absolutely void, but are voidable only at the election of the injured party.[3] If he chooses to remain satisfied, the other party cannot complain, and the transaction will stand. Another result of the *voidable* character of fraudulent transactions is that the injured party ought to be prompt in setting the transaction aside, as equity does not encourage *laches*.[4] Thus, in a recent case in Iowa, where an infant was fraudulently induced to execute a deed of land to another, believing that she was merely executing an instrument authorizing the person named therein to sell the land, and failed to make inquiry concerning the exercise of the power for thirteen years after attaining majority, when she was first informed of the fraud, she was held barred by her negligence from asserting her claim to the premises.[5] Moreover, innocent third parties without notice may acquire rights and interests of which they cannot be deprived. A *bonâ*

[1] See Kincaid *v.* Conly, Phillips Eq. 270.

[2] See Kisterbock's Appeal, 1 P. F. Sm. 485.

[3] Oakes *v.* Turquand, L. R., 2 H. L. Cas. 346; Pearsoll *v.* Chapin, 8 Wright, (Pa.) 9; Negley *v.* Lindsay, 17 P. F. Sm. 228; Wood *v.* Goff, 7 Bush, 63; Lindsley *v.* Ferguson, 49 N. Y. 625.

[4] Willoughby *v.* Moulton, 47 N. Hamp. 208; Weeks *v.* Robie, 42 Id. 316; Akerly *v.* Vilas, 21 Wis. 88; Wilbur *v.* Flood, 16 Mich. 40; Badger *v.* Badger, 2 Wal. 87, 94; Jones *v.* Smith, 33 Miss. 215; Campau *v.* Van Dyke, 15 Mich. 371.

Weaver *v.* Carpenter, 42 Iowa, 342.

fide purchaser, without notice, for a valuable consideration, will be protected even though he claim under a grantor who has obtained the property by fraud, which would, as between the original parties, render its acquisition invalid.[1]

There is, indeed, a distinction between deeds and other instruments which a man *intends* to execute, though his intention may be brought about by fraudulent means, and those which he has no intention to execute, but executes under the impression that the instrument is of a different character from what it actually is, or, in other words, executes the wrong paper. In the latter case the instrument is absolutely void, and the law above stated in relation to voidable instruments would, in general not apply.[2]

203. The next general rule to be noticed in cases of fraud is that in equity no length of time, however great, will be a bar to the right to relief, if the injured party has been in ignorance of the fraud.[3] In courts of equity, ordinarily, the statute of limitations is a good plea in bar;[4] and moreover it is a general principle that stale claims ought not to be encouraged.[5] But

[1] Oakes *v.* Turquand, *supra.* See also, Scholefield *v.* Templer, 4 De G. & J. 429.

[2] See Donaldson *v.* Gillot, L. R., 3 Eq. 277; Ogilvie *v.* Jeafferson, 2 Giff. 353; Kerr on Fraud and Mistake, 50; Livingston *v.* Hubbs, 2 Johns. Ch. 512; County of Schuylkill *v.* Copley, 17 P. F. Sm. 386. See, also Chamberlain *v.* McClurg, 8 Watts. & Serg. 36; McHugh *v.* County of Schuylkill, 17 P. F. Sm. 396.

[3] Charter *v.* Trevelyan, 11 Cl. & Fin. 714; Michoud *v.* Girod, 4 How. 561; Relf *v.* Eberly, 23 Iowa, 467; Cock *v.* Van Etten, 12 Minn. 522. See Vane *v.* Vane, L. R., 8 Ch. App. 398, under the English Statute of Limitations of William IV.

[4] Neely's Appeal, 4 Norris, 490; Bickel's Appeal, 5 Id. 204; Blanchard *v.* Williamson, 70 Ill. 647; Lansing *v.* Starr, 2 Johns. Ch. 150; Kane *v.* Bloodgood, 7 Id. 90, where the subject is examined.

[5] See Farnam *v.* Brooks, 9 Pickering 212; Ward *v.* Van Bokkelen, 1 Paige, 100; Shaver *v.* Radley, 4 Johns. Ch. 310; Farr *v.* Farr, 1 Hill (Eq.), 391; Field *v.* Wilson, 6 B. Mon. 479; Thompson *v.* Blair, 3 Murph. 593; Bruce *v.* Child, 4 Hawks, 372; Perry *v.* Craig, 3 Mo. 525 (365); Ferris *v.* Henderson, 2 Jones, (Pa.) 54; Bank of United States *v.* Biddle, 2 Pars. Eq. 31; McDowell *v.* Goldsmith, 2 Maryl. Ch. 370; Harrod *v.* Fountleroy, 3 J. J. Marsh. 548; Phillips *v.* Belden, 2 Edw. Ch. 1; Anderson *v.* Burwell, 6 Grat. 405; Maxwell *v.* Kennedy, 8 How. 210; Paschall *v.* Hinderer, 28 Ohio St. 568; Barnes *v.* Taylor, 27 N. J. Eq. 259; In re Butler, 2 Hugh. 247; Butler *v.* Haskell, 4 Des. 651; Gresley *v.* Mousley, 4 De G. & J. 78; Thomson *v.* Eastwood, L. R., 2 App. Cas. 215; Allire *v.* Jewell, 4 Otto, 512; Sullivan *v.* Portland Rd. Co., Id. 811; Lansdale *v.* Smith, 106 U. S. 391; Hines *v* Thorn, 57 Tex. 625; Perry on Trusts § 229. *Post*, § 260.

in the case of undiscovered fraud the rule is different; and no length of time can secure those, who have benefited thereby, in the enjoyment of their gains.

In order to prevent the statute from running, however, actual *concealment* would seem to be necessary; the mere fact of non-discovery will not be enough,[1] unless the relation of the parties is such that it was the duty of the party complained of to make the disclosure.[2]

204. Again, it must also be remembered that in cases of fraud, the injured party cannot repudiate the transaction, so far as it is injurious to himself and adopt it so far as it is beneficial. He must either allow it to stand or set it aside *in toto*.[3]

Moreover, a party who has brought an action which is based upon an affirmance of an alleged fraudulent transaction, cannot at all events in that action, be heard to complain of the fraud. If he sues (for example) for the fruits of a breach of trust he must be deemed to have acquiesced in the illegal act.[4] And a party who has participated in a fraud or contributed to the means by which it has been effected will not be permitted to recover the amount which he has advanced until innocent parties have been made whole.[5]

205. Having premised the above general observations upon the nature of fraud and the scope of the jurisdiction in chancery based upon it, it will now be proper to consider more in detail the several subdivisions of fraud, and the different instances which are found under each.

The *general* division of fraud which has usually been made by judges and authors is into fraud which grows out of direct facts or circumstances of imposition or *actual* fraud, and fraud which is inferred from the nature of the transaction or the relations of the parties, and which is therefore known as *presumptive*

[1] Peck *v.* Bullard, 2 Humph. 41; Township of Boomer *v.* French, 40 Iowa, 601; Humphrey *v.* Mattoon, 43 Id. 556; Hudson *v.* Wheeler, 34 Tex. 356; Munson *v.* Hallowell, 26 Id. 477; Callis *v.* Waddy, 2 Munf. 511; Reed *v.* Minell, 30 Alab. 61; Meader *v.* Norton, 11 Wal. 443; Bigelow on Fraud, 445.

[2] Wilson *v.* Ivy, 32 Miss. 233; Buckner *v.* Calcote, 28 Id. 432.

[3] Great Luxembourg Railway Co. *v.* Magnay, 25 Beav. 594; Farmers' Bank *v.* Groves, 12 How. 51; Potter *v.* Titcomb, 22 Maine, 300; Kerr on Fraud and Mistake, 52. See Bellamy *v.* Sabine, 2 Phillips, 425, for an illustration of an exceptional case.

[4] See Coleman *v.* Columbia Oil Co., 1 P. F. Sm. 77.

[5] Kisterbock's Appeal, 1 P. F. Sm. 483.

or *constructive* fraud. This division has the sanction of the great name of Story, and has been followed by later writers, both upon the particular subject of fraud and upon the general doctrines of equity.[1]

But within the past few years there has arisen a tendency to narrow the meaning of the word *fraud;* and in obedience to this tendency the term "*constructive*" fraud and the kindred term "*legal*" fraud, have been not a little criticized. "I do not understand legal fraud," said Lord Bramwell, in Weir *v.* Bell,[2] decided by the Court of Appeal in 1878. "To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade." In the still later case of Joliffe *v.* Baker,[3] decided in 1883, Mr. Justice Watkins Williams quoted the above remark of Lord Bramwell with approval, and then went on to say: "Armed with this authority of Lord Bramwell, I reject the phrase 'legal fraud' as distinguished from moral fraud and deceit as wholly inapplicable and inappropriate to legal discussion."

Finally, the modern opinion upon this subject has been summed up in the rather emphatic declaration of a distinguished writer, that "legal or constructive fraud may be discarded as a worse than useless figment."[4]

While, therefore, students of the jurisprudence of courts of chancery have become familiarized with the division of fraud into actual and constructive, and while this division has the sanction of continued use and great authority, and while it may be premature to say that the time has come for discarding it as a useless figment, it is yet desirable to bear in mind the tendency of modern criticism upon the subject and not to be unmindful of the scientific view of the matter which is now being taken by thoughtful writers and distinguished judges.

But whatever may be the theory, yet, for the purposes of

[1] See Story's Equity Jurisprudence, and particularly sect. 258, where Constructive Fraud is defined. In the introduction to Bigelow on Fraud the following language is used: "The substantive law of fraud is divided into two branches, actual and constructive, or presumptive fraud. Actual fraud is fraud in fact, involving moral turpitude; constructive or presumptive fraud is fraud in law." Introduction to Bigelow on Fraud. Pomeroy (Eq. Juris.) adopts the same division; and in Kerr on Fraud and Mistake, the same view, apparently, is taken.

[2] 2 Ex. Div. 243.

[3] 11 Q. B. Div. 271.

[4] Pollock on Contracts, 480: Chap. on Misrepresentation and Fraud.

convenient and practical consideration, the celebrated division of fraud made by Lord Hardwicke in the case of Chesterfield *v.* Janssen[1] is perhaps the best. That learned judge in that case divided fraud into four classes,[2] viz:—

1. Fraud arising from facts and circumstances of imposition;
2. Fraud arising from the intrinsic matter of the bargain itself;
3. Fraud presumed from the circumstances and condition of the parties contracting; and
4. Fraud affecting third persons not parties to the agreement.

It will be observed that the first of these subdivisions embraces cases of *actual* fraud; the second and third include instances of *constructive* fraud; and the last has relation to third parties whom the fraud may affect.

206. As to the first of the above-mentioned heads of fraud, it may be stated as a general rule, that fraud consists in anything which is calculated to deceive, whether it be a single act or combination of circumstances, whether it be by suppression of the truth[3] or a suggestion of what is false; whether it be by a direct falsehood, or by *innuendo*, by speech or by silence,[4] by word of mouth or by a look or gesture.[5] Fraud of this kind may be defined to be any artifice by which a person is deceived to his disadvantage.[6] Where a person claims relief on the ground that he has thus been deceived, it is his duty (according to the doctrine laid down by an English chancellor in a modern case) to establish two things: *first*, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the

[1] 1 Atk. 301, 2 Ves. 125; 1 Lead. Cas. Eq. 428 (541, 4th Eng. ed.).

[2] The division is in fact into *five* classes; but the last class, that of reversioners, is said by Lord Hardwicke himself to be properly compounded of the others.

[3] See Mallory *v.* Leach, 35 Vt. 156; Ruffner *v.* Ridley, 81 Ky. 165.

[4] Silence, however, is by no means necessarily equivalent to direct affirmation; for in very many cases no duty of disclosure exists. Ordinarily, indeed, it is only where, from what has passed in the transaction or from some relationship between the parties, disclosure becomes a duty, that silence is a fraud. The People's Bank's Appeal, 93 Pa. St. 107.

[5] Lobdell *v.* Baker, 1 Met. 193; Mizner *v.* Kussell, 29 Mich. 229; Lee *v.* Jones, 14 C. B. N. S. 384; Croyle *v.* Moses, 9 Norris, 250; Donovan *v.* Donovan, 9 Allen, 140; Faulkner *v.* Klamp, 16 Neb. 174; Bigelow on Fraud, 4.

[6] See Juzan *v.* Toulmin, 9 Ala. 684; Smith *v.* Richards, 13 Peters, 36; Laid law *v.* Organ, 2 Wheat. 195; Tyler *v.* Black, 13 How. 231.

person making them, and the intention which the law justly imputes to every man, to produce those consequences which are the natural results of his acts; and, *secondly*, he must establish that this fraud was an inducing cause to the contract, for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct.[1]

The representations, therefore, which deserve the name of fraudulent are usually said to be representations which are false in themselves, not known to be true by the party making them, reasonably relied upon by the other party, and furnishing a substantial inducement to his action.[2]

207. The representation must, in the first instance, be false in point of fact, and it necessarily follows that it must be a repre-

[1] By the Earl of Selborne, L. C., in Smith *v.* Chadwick, 9 App. Cas. 190.

[2] In Adams's Equity, p. 176, the rule is laid down that the representations must be false in themselves, false to the knowledge of the party making them, reasonably relied upon by the other party, and furnishing a substantial inducement to the contract. See, also, Bigelow on Fraud, p. 3. And Stevens *v.* Moore, 73 Me. 559. In Masterton *v.* Beers, 1 Sweeney, 406, it was said that to rescind a contract the complainant must establish, 1st, the representation and its falsity; 2d, that he relied upon such representation, and was deceived thereby; and 3d, that it was material to the subject-matter of the contract. In Byard *v.* Holmes, 5 Vroom, 297, the requisites were stated to be, 1st, that the defendant made some representation to the complainant meaning that he should act upon it; 2d, that such representation was false, and that the defendant when he made it knew it to be false; and 3d, that the plaintiff believed such representation to be true, acted upon it, and was thereby injured.

It will be seen, however (*post*, Section 214), that the second of the requisites in Adams's Equity and in Byard *v.* Holmes is not quite accurately stated, as, according to the best considered modern authorities, a man has no more right to assert as a fact that which he does not know to be true, than to state that which he knows to be false. See, also, Hubbell *v.* Meigs, 50 N. Y. 489; and Smith *v.* Dye, 15 Mo. App. 585. A man is responsible for a false representation, even though he has no interest in the deception; Weed *v.* Case, 55 Barb. 547.

It may be useful to refer the reader in this connection to the definitions of fraud and misrepresentation given by the Seventeenth and Eighteenth Sections of the Indian Contract Act on Fraud. According to that act, "fraud means and includes any of the following acts committed by a party to a contract or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) The active concealment of a fact by one having knowledge or belief of the fact.

(3) A promise made without any intention of performing it;

(4) Any other act fitted to deceive;

sentation of that which is a matter of fact,[1] and not a mere matter of opinion or judgment.[2] No man can be held responsible for an error or mistake in his opinion, unless his language amounts to a warranty, or unless he puts forth, in the form of an opinion, something which he knows to be incorrect, and upon which the other party relies.[3] Subject to these qualifications, the general rule is that no one is entitled to rely upon an assertion which must of necessity be a mere statement of opinion. A man who is dealing with another has a right to rest upon an assertion of a *fact* made by the latter;[4] but he has no right to rely upon the latter's opinion, unless indeed he is an expert, in which case the parties do not deal upon equal terms, and the ordinary rule does not apply.[5]

Nor is it a fraud for a man to praise his own wares and extol their value,[6] and to depreciate that which he is to receive in

(5) Any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, unless his silence is in itself equivalent to speech.

Misrepresentation means and includes—

(1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) Any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement." Pollock on Contracts, 701, Appendix.

In considering the definitions of Fraud and Misrepresentation under this Act the reader will have to refer to the definition of Contracts given in the tenth section thereof and of consent as stated in the thirteenth and fourteenth sections. The sweeping meaning heretofore given to Fraud, by equity judges, is discarded in the Act. Pollock on Contracts, 700. Appendix.

[1] Leake on Contracts 182.

[2] See Hazard *v.* Irwin, 18 Pick. 105; Curry *v.* Keyser, 30 Ind. 214; Stow *v.* Bozeman, 29 Ala. 397; Watts *v.* Cummins, 9 P. F. S. 84; Sawyer *v.* Prickett, 19 Wal. 146. For cases illustrative of misrepresentations of fact, see Tyler *v.* Black, 13 How. 230; Bennett *v.* Judson, 21 N. Y. 238; Manning *v.* Albee, 11 Allen, 522.

[3] Birdsey *v.* Butterfield, 34 Wis. 52; Pike *v.* Fay, 101 Mass. 134; Bigelow on Fraud, 26.

[4] See Mead *v.* Bunn, 32 N. Y. 295.

[5] See Picard *v.* McCormick, 11 Mich. 68; Kost *v.* Bender, 25 Id. 515.

[6] *Simplex commendatio non obligat.* See Adams *v.* Soule, 33 Vt. 549. See, also, Gatly *v.* Holcomb, 44 Ark. 216, where it was said that the rule allowing commendation by a vendor was applicable only when the purchaser has a full opportunity to inspect.

return.[1] Such exaggerations are common in all sales or barters; and every man has a right to praise the commodity which he offers, provided he does not overstep the line, and assert that to be a fact which is not so, or enter into a warranty, or make a representation which is so far connected with the contract as to enter into and form a part of it.[2] A man, for example, who is selling a rope, may say that the rope is a good rope, and that he believes that it will stand the strain of a heavy weight, and he cannot be held responsible if the event is otherwise. But if he were to say that the rope had been tested with so many pounds weight, when in point of fact it had not;[3] or were to

[1] French *v.* Griffin, 3 C. E. Green, 279; Hunter *v.* McLaughlin, 43 Ind. 38; 2 Kent's Com. 485; Leake on Contracts, 183.

[2] See Haygarth *v.* Wearing, L. R., 12 Eq. 327, where false representations as to the *value* of an estate, made by the purchaser, and relied upon by the vendor, were held sufficient to justify an application to rescind the sale. "This was not a mere purchaser's assessment," said Vice Chancellor Sir John Wickens, "but a deliberate statement made to her (the vendor), for her guidance in the transaction, and was acted on by her in reliance on its good faith and accuracy." See, also, Adams *v.* Soule, 33 Verm. 549, where the court pointed out the difference between a case in which there was merely "that recommendation and representation which one naturally makes of his own property for the purpose of convincing the purchaser of its desirableness;" and a case in which the representations as to value are the result of a fraudulent conspiracy. See the next note.

[3] See Sieveking *v.* Litzler, 31 Ind. 17, where it was held, that, while mere assertions as to the *value* of the mill, which was the subject of the sale, would not have been any foundation for relief, yet a false statement that the mill could saw a certain number of feet of lumber *per diem*, was a ground for rescission. To the same effect are Coon *v.* Atwell, 46 N. Hamp. 510; Faribault *v.* Sater, 13 Minn. 223; Reid *v.* Flippen, 47 Ga. 273; Harvey *v.* Smith, 17 Ind. 272; Allin *v.* Millison, 72 Ill. 201; and Martin *v.* Jordan, 60 Maine, 531. But representations as to the original *cost* of the property, where there is no fiduciary relation between the parties, have been held in some cases, to furnish no ground for a rescission. Holbrook *v.* Connor, 60 Maine, 578; Hemmer *v.* Cooper, 8 Allen, 334; Mooney *v.* Miller, 102 Mass. 220; Cooper *v.* Lovering, 106 Mass. 79; Nœtling *v.* Wright, 72 Ill. 390; Tuck *v.* Downing, 76 Id. 71. See, however, the dissenting opinion of Mr. Justice Dickerson in Holbrook *v.* Connor. But it will be observed that in Bagshaw *v.* Seymour, 4 C. B. (N. S.) 873, and Clarke *v.* Dickson, 6 Id. 453 (referred to by that learned judge), there existed a fiduciary relation. In some cases it has been held that statements of value are actionable; Simar *v.* Canaday, 53 N. Y. 298; Cruess *v.* Fessler, 39 Cal. 336; Gifford *v.* Carvill, 29 Id. 589; Davis *v.* Jackson, 22 Ind. 233; Neil *v.* Cummings, 75 Ill. 170. See, also, Van Epps *v.* Harrison, 5 Hill, 63; Morehead *v.* Eades, 3 Bush, 121; McFadden *v.* Robinson, 35 Ind. 24; McAleer *v.* Horsey, 35 Maryl. 439.

warrant the rope to be of a particular quality, and it was not of that quality; or were to assert that it was fit for the particular purpose for which the purchaser was buying it, and it were to turn out to be unsuited for that purpose; in all such cases the vendor would be entitled to have the contract rescinded.[1]

A party should not state as a fact, *i. e.*, as a matter of actual knowledge, that as to which he has only an opinion or belief.

208. The rules in regard to fairness in representations are to be particularly observed in prospectuses of projected companies. The utmost candor and honesty ought to characterize such public statements. Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will enter into a proposed undertaking, and inviting them to take shares upon the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as a fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as an inducement to take shares.[2] If it can be shown that a material representation, which is not true, is contained in the prospectus, or in any document forming the foundation of the contract between the company and the shareholder, and the latter comes within a reasonable time, and under proper circumstances, to be released from that contract, the courts are bound to relieve him from it.[3]

[1] The whole subject of the right to rescind contracts of sale of personal chattels for misrepresentation will be found discussed in the note to Chandelor *v.* Lopus, 1 Smith's Lead. Cas. 299.

[2] New Brunswick, etc., Railway Co. *v.* Muggeridge, 1 Dr. & Sm. 363; Directors of Central Railway Co. of Venezuela *v.* Kisch, L. R., 2 H. L. Cas. 113. It was, however, said by Lord Justice Turner, that in cases of this kind "allowances must be made for some latitude of statement;" 3 De G., J. & S. 135. See, also, Hallows *v.* Fernie, L. R., 3 Ch. 475.

[3] Smith's Case, L. R., 2 Ch. 609. See, also, Swift *v.* Winterbotham, L. R., 8 Q. B. 244; Paddock *v.* Fletcher, 42 Verm. 389; McClellan *v.* Scott, 24 Wis. 81; Bagshaw *v.* Seymour, 4 C. B. (N. S.) 873; Clarke *v.* Dickson, 6 Id. 453. In such cases the directors will be liable; Edgington *v.* Fitzmaurice, 29 Ch. D. 459. The rule stated in the text, however, may not apply where the shareholder has obtained his stock in the open market, and not from the company. Peek *v.* Gurney, L. R., 6 House of Lords Cases, 377. But see New York & New Haven Railroad Company *v.* Schuyler, 34 New York, 30; Phelps *v.* Wait, 30 N. Y. 78; Suydam *v.*

209. There is, however, a species of representation as to value which *is* fraudulent, viz., that which is known as puffing at auctions. Puffing is where a fictitious competition is got up by the false bidding of one or more persons, by which real bidders are misled, and are induced by the false appearance of a demand, which does not actually exist, to make their offers. Such a sale cannot be enforced.[1] The rule at law in such cases, singular to say, seems to be more strict against fraud than that in equity. Where the conditions of sale contain the usual provision that the highest bidder shall be the purchaser, courts of law have held that no bidding whatever on behalf of the vendor—even by a single agent—is allowable. But in equity, it has been in some cases laid down as the rule, that a vendor may authorize a person to bid for him up to a reserved price, so as to prevent the property from going below that price.[2] But the present inclination of the courts is, perhaps, to make the rule in equity conform to that at law.[3] If, therefore, the vendor does not wish the property to be sacrificed, he must limit it—in which case, if the limit is not reached by *bonâ fide* bids, the subject of the sale may be withdrawn.

210. As, on the one hand, a sale at auction may be fraudulent as against the purchaser, by reason of the enhancement of the price by means of fictitious bids; so, on the other hand, it may be fraudulent as against the owner of the property, when parties are deterred from bidding by false representations. Thus, the owner of property sold at a judicial sale, has a right to come into equity for relief, when it appears that a purchaser made untrue representations whereby other persons were prevented from bidding, and by which the property was obtained at an undervalue.[4]

Moore, 8 Barb. 358; Bruff *v.* Mali, 36 N. Y. 200.

[1] Veazie *v.* Williams, 8 Howard, 134; Pennock's Appeal, 2 Harris, (Penna.) 449; Staines *v.* Shore, 4 Id. 200; Towle *v.* Leavitt, 3 Foster, 360; Woods *v.* Hall, 1 Dev. Eq. 411; Trust *v.* Delaplaine, 3 E. D. Smith, 219; Kerr on Fraud and Mistake, 225; Bigelow on Fraud, 145. See also, Faucett *v.* Currier, 115 Mass. 20; Williams *v.* Bradley, 7 Heisk. 54; Dimmock *v.* Hallett, L. R., 2 Ch. 21.

[2] Davis *v.* Petway, 3 Head, 667 The general subject is discussed in this case, and *puffing* is disapproved; although the sale under consideration was sustained.

[3] Mortimer *v.* Bell, L. R., 1 Ch. App. 12, 13. See also, Woodward *v.* Miller, 2 Coll. 279.

[4] Cocks *v.* Izard, 7 Wal. 559.

In such cases the purchaser will be treated as a trustee, and cannot retain the property, thus fraudulently acquired, for his own benefit.[1]

So also it may, perhaps, be stated as a general rule that where at a public sale bidders are deterred from purchasing by a declaration that a particular buyer is acting for the benefit of some party beneficially interested, and the particular buyer is, in this way, enabled to secure the property, he will be held as a trustee, for the party in whose favor he held out that the purchase was being made.[2] When, however, there is nothing more than the breach of a parol agreement, the statute of frauds, in cases of real estate, would apply, and no trust which could be enforced would arise.[3]

211. The representation must not be an expression of *intention* merely. A man has no right to rely upon what another says he intends to do;[4] unless, indeed, the expression of intention assumes such a shape that it amounts to a contract, when, of course, the party will be bound by his engagement.[5] But if the representation amounts to a statement of fact, although dependent upon future action, it may, if fraudulently made, furnish ground for equitable relief.[6]

212. A false representation of a matter of law is no reason for rescinding a contract, because every person is supposed to know the law;[7] although in some exceptional cases relief, where mis-

[1] See Brown *v.* Dysinger, 1 Rawle, 408; Cook *v.* Cook, 19 P. F. Sm. 443; Seylar *v.* Carson, Id. 81; Bethell *v.* Sharp, 25 Ill. 173; Ryan *v.* Dox, 34 N. York, 307; Roach *v.* Hudson, 8 Bush, 410; Grumley *v.* Webb, 44 Mis. 444; Mackay *v.* Martin, 26 Tex. 57.

[2] See Hayman's Appeal, 15 P. F. Sm. 433; Barnet *v.* Dougherty, 8 Casey, 371; Beegle *v.* Wentz, 5 P. F. Sm. 369; Faust *v.* Haas, 23 Id. 301; Boynton *v.* Housler, Id. 453. See, also, Martin *v.* Morris, 62 Wis. 418.

[3] Kistler's Appeal, 23 P. F. Sm. 398; *ante*, p. 120.

[4] Feret *v.* Hill, 15 C. B. 207; Jorden *v.* Money, 5 H. L. Cas. 185 (though see the dissenting opinion of Lord St. Leonards, Id. 248, 249); Citizens' Bank *v.* First Nat. Bank, L. R., 6 H. L. Cas. 352; Long *v.* Woodman, 58 Maine, 49; Grove *v.* Hodges, 5 P. F. Sm. 519; Leake on Contracts, 182.

[5] Hammersley *v.* De Biel, 12 Cl. & Fin. 45. See, also, Maunsell *v.* White, 4 H. L. 1056; Caton *v.* Caton, L. R., 2 H. L. 127; Kerr on Fraud and Mistake, 89; Perry on Trusts, § 208.

[6] Piggott *v.* Stratton, Johns. 359; 1 De G., F. & J. 49. And see Kimball *v.* Ætna Ins. Co., 9 Allen, 540.

[7] Kerr on Fraud and Mistake, 90. Leake on Contracts, 182. See Reed *v.* Sidener, 32 Ind. 373; Steamboat Belfast *v.* Boon, 41 Alab. 68; Drake *v.*

representations of law have been made, nas been granted.[1] Where, indeed, there is a mutual *mistake* in regard to the effect of a legal instrument; or where the relations of the parties are such that the injured party relies upon the other, the rule may be different.[2] But the relief afforded in cases of this kind depends upon other heads of equity—viz., upon *mistake*, or upon fraud arising from the relation of the parties, the former of which has been already noticed.[3] In the present connection, the rule must be stated to be, that misrepresentations of the law, apart from other considerations, do not constitute fraud in its technical sense, either at law or in equity.

213. It has been already stated that fraud may consist in silence as well as in actual, outspoken misrepresentation. The *suppressio veri*, whenever it becomes the means of deceit, is regarded with disfavor in equity, no less than the *suggestio falsi*. It is very true that a man is not always obliged to speak out. Under ordinary circumstances a vendor and a purchaser stand at arms' length, and the former is not obliged at law or in equity, no matter what the rule of morality may be, to disclose latent defects in the subject-matter of the sale; nor is the purchaser bound to inform the seller of advantages known only to himself.[4] Lord Thurlow, as an illustration of this doctrine, put the case of a man buying land under which there was a mine, known only to the purchaser, and said that the latter was not bound to disclose his knowledge.[5] Singular to say, such cases

Latham, 50 Ill. 270; Fish *v.* Cleland, 33 Ill. 243; Upton *v.* Tribilcock, 1 Otto, 45; Grant *v.* Grant, 56 Maine, 573; Bigelow on Fraud, 9.

[1] See Brown *v.* Rice, 26 Gratt. 467; Moreland *v.* Atchison, 19 Tex. 303.

[2] Peter *v.* Wright, 6 Ind. 183; Shaeffer *v.* Sleade, 7 Blackf. 178; Cooke *v.* Nathan, 16 Barb. 342; Langstaffe *v.* Fenwicke, 10 Ves. 405.

[3] *Supra*, page 241.

[4] See Laidlaw *v.* Organ, 2 Wheat. 178; Kintzing *v.* McElrath, 5 Barr, 467; Hanson *v.* Edgerly, 29 N. H. 343; Smith *v.* Countryman, 30 N. Y. 655; Fisher *v.* Budlong, 10 R. Island, 525; Hadley *v.* Clinton Importing Co., 13 Ohio St. 502; Williams *v.* Spurr, 24 Mich. 335; Law *v.* Grant, 37 Wis. 548; Mitchell *v.* McDougall, 62 Ill. 498; Frenzel *v.* Miller, 37 Ind. 1. But in Missouri see Cecil *v.* Spurger, 32 Missouri, 462; McAdams *v.* Cates, 24 Id. 223; Barron *v.* Alexander, 27 Id. 530; and in Mississippi see Patterson *v* Kirkland, 34 Miss. 423, 431.

[5] Turney *v.* Harvey, Jac. 169, 178.

have actually arisen in this country, and the dictum of Lord Thurlow has been followed.[1]

If, however, a man professes to describe the article which he is selling, he must describe everything that is material. If he undertakes to tell the truth, it will not do for him to tell only part of the truth.[2]

Nor can a man remain silent if it is his duty to speak. Suppression of the truth in such a case is a fraud.[3] Familiar illustrations of this principle are found in the contracts of insurance and suretyship, where from the situation of the parties the duty of disclosure is greater than in ordinary cases.[4]

214. The second of the requisites necessary to render a representation fraudulent was formerly said to be, that it must be false within the knowledge of the party making it.[5] But this statement is not, under the more modern authorities, entirely accurate; for a man, it is said, must be held responsible for asserting that which he does not know to be true, as much as if he designedly asserted that which he knew to be false, provided that the assertion has the effect of deceiving the other party.[6]

Where a man knows that what he says is untrue, the case is, of course, a very plain one. He must be answerable, even if the assertion of the untruth were made with good intentions and without designing any fraud.[7] The difficult cases are those in

[1] Harris *v.* Tyson, 12 Harris, (Pa.) 347; Williams *v.* Spurr, 24 Mich. 335. But, see, Williams *v.* Beazley, 3 J. J. Marsh. 578. Consult, Law *v.* Grant, 37 Wis. 548; Bigelow on Fraud, 33.

[2] Kerr on Fr. and Mis., 91, 92.

[3] See Young *v.* Bumpass, 1 Freem. Ch. 241; Paddock *v.* Strobridge, 29 Verm. 470, 477; Kerr on Fraud and Mistake, 95; Leake on Contracts, 184.

[4] See Carter *v.* Boehm, 3 Burr. 1905; 1 Sm. Lead. Cas. pt. 2, 834, notes; notes to Locke *v.* Am. Ins. Co., 2 Am. Lead. Cas. 926; Leake on Contracts, 199; Perry on Trusts, § 179.

[5] See Proctor *v.* Spatley, 78 Va. 254, where the old rule is attempted to be upheld.

[6] Pulsford *v.* Richards, 17 Beav. 87; Redgrave *v.* Hurd, 20 Ch. D. 13; Hough *v.* Richardson, 3 Story, 659; Smith *v.* Richards, 13 Pet. 26; Bennett *v.* Judson, 21 N. Y. 238; Marsh *v.* Falker, 40 40 Id. 562; Allen *v.* Hart, 72 Ill. 104; Converse *v.* Blumrich, 14 Mich. 109, 123; Glasscock *v.* Minor, 11 Mo. 655; Hunt *v.* Moore, 2 Barr, 105; Taymon *v.* Mitchell, 1 Md. Ch. 496; Reese *v.* Wyman, 9 Geo. 439; Turnbull *v.* Gadsen, 2 Strob. Eq. 14; Lewis *v.* McLemore, 10 Yerg. 206; Thompson *v.* Lee, 31 Alab. 292; Oswald *v.* McGehee, 28 Miss. 340; York *v.* Gregg, 9 Tex. 85; Joliffe *v.* Baker, 11 Q. B. Div. 271; Hill on Trustees, 226 (4th Am. ed.); Leake on Contracts, 188, 189; Lowe *v.* Trundle, 78 Va. 65.

[7] Polhill *v.* Walter, 3 B. & Ad. 114; Bankhead *v.* Alloway, 6 Cold. 75; Leake on Contracts, 187.

which the party does not know that his representations are untrue. Several different classes of cases may arise under this head.

Thus, in the first place, a party may be in entire ignorance, whether his assertion is, in point of fact, true or false. Here the party may, in one sense, be said not to know that his assertion is false, for *non constat* but that it may turn out to be true. But the sounder doctrine is, that a man has no right wilfully to assert as a fact that of which he is in entire ignorance. Such reckless assertions ought to render him responsible both in morals and law. A man must have reasonable grounds for believing the truth of what he says. It is, in law, a wilful falsehood for a man to assert of his own knowledge a matter of which he has no knowledge.[1]

Again, a man may honestly believe, upon reasonable grounds, that what he asserts is true, when, in point of fact, it may turn out to be otherwise. The party in such a case is not liable. No man can be held responsible for a misrepresentation made through an honest mistake.[2] No fraudulent intention can be imputed in such a case.[3] If, however, he afterwards discovers the untruth, he must not allow the other party to act on the belief that no mistake has been made. To do so would be fraud.[4]

But again, a party *may* be held responsible, even for an honest mistake, if the *duty* of knowing the truth is for any reason cast upon him. In such a case, mistake, ignorance or forgetfulness is no excuse.[5]

In all of these cases, the question is whether a fraudulent intent is to be imputed to the person making the representation.

[1] Hazard *v.* Irwin, 18 Pick. 95; Stone *v.* Denny, 4 Metc. 151; Kerr on Fraud and Mistake, 54. See, also, remarks of Watkins Williams, J., in Joliffe *v.* Baker, 11 Q. B. Div. 271.

[2] See Fisher *v.* Mellen, 103 Mass. 503; Cabot *v.* Christie, 42 Vt. 126; Kerr on Fraud and Mistake, 57. That class of cases must be put out of consideration, in which the mistake is one which relates to the substance of the contract. Thus, if a man were to sell a horse under the honest belief that he was alive at the time of the sale, when, in point of fact, it should afterwards turn out that the horse was dead, the purchaser would, of course, be entitled to have the contract rescinded.

[3] Leake on Contracts, 187. See, however, Bankhead *v.* Alloway, 6 Cold. 75.

[4] Reynell *v.* Sprye, 1 De G., M. & G. 660; Kerr on Fraud and Mistake, 67.

[5] Burrowes *v.* Lock, 10 Ves. 470; Babcock *v.* Case, 11 P. F. Sm. 430; Kerr on Fraud and Mistake, 69.

If a person asserts what he does not know to be true, fraud is presumed in law, even if no actual fraud was intended.

If the assertion is honestly believed to be true, no fraudulent intent will be presumed.

If it is the *duty* of the party to know the truth, a misrepresentation will be presumed to be fraudulent.[1]

215. The third requisite necessary to render a misrepresentation fraudulent, is that it must be reasonably relied on by the other party, and this obviously includes two subdivisions; first, the party must have *a right*, as a reasonable being, to rely upon the representation; and, secondly, he must, in point of fact, so rely upon it. No man, for example, would be heard to complain of a representation so wildly extravagant and so palpably absurd and false that no reasonable human being could possibly be deceived thereby;[2] and the same rule has, with justice, been applied to statements of a vague and uncertain character.[3] Nor could a contract be rescinded for a misrepresentation, if its falsity were known to the party to whom it was made.

If the party to whom the representation is made resorts to inquiries on his own account, and shows by his conduct, that he relies upon them, he cannot complain of a misrepresentation.[4] *A fortiori*, if he was actually aware of the true state of the case—for then he was not deceived.[5] And a man is bound to make use of the means of information.[6] But if the parties do not deal upon equal terms, as if one has better means of knowledge than the other; or, if any artifice is used for the purpose of preventing inquiry; the transaction will be fraudulent.[7]

[1] See Bigelow on Fraud, 56, *et seq.*

[2] See opinion of Shipley, J., in Irving *v.* Thomas, 18 Me. 418, 424.

[3] Halls *v.* Thompson, 1 Sm. & M. 443; Savage *v.* Jackson, 19 Ga. 305.

[4] Attwood *v.* Small, 6 Cl. & Fin. 232, 336; Jennings *v.* Broughton, 17 Beav. 234; 5 De G., M. & G. 126, 136; Clark *v.* Everhart, 13 P. F. Sm. 347. See, also, Tindall *v.* Harkinson, 19 Ga. 448; Bell *v.* Henderson, 6 How. (Miss.) 311; Glasscock *v.* Minor, 11 Mo. 655; Yeates *v.* Pryor, 6 Eng. 68; Pratt *v.* Philbrook, 33 Me. 17. See Redgrave *v.* Hurd, 20 Ch. D. 13, for an examination of this question and for an explanation of Atwood *v.* Small.

[5] Hough *v.* Richardson, 3 Story, 659; Veasey *v.* Doton, 3 Allen, 380; Kerr on Fraud and Mistake, 75, *et seq.* See also Winter's Appeal, 11 P. F. Sm. 307; and Parker *v.* Hayes, 39 N. J. Eq. 469.

[6] Wright *v.* Gully, 28 Ind. 475; Clark *v.* Everhart, 13 P. F. Sm. 347; Brown *v.* Leach, 107 Mass. 364.

[7] See Mead *v.* Bunn, 32 N. Y. 275

216. The last requisite to a fraudulent representation is that it must furnish a substantial inducement to the contract; in other words, it must be material. In the language of the civil law, it must be *dolus dans locum contractui.* The test is whether the party would have entered into the contract if the fraudulent representation had not been made.[1]

But trifling and immaterial misrepresentations will not induce a court of equity to interfere.[2] Thus in a recent case in Iowa representations were made in reference to a patent right, which was the subject of a sale, in a certain particular. It turned out that the representation was untrue, but that the value of the invention was not, on that account, materially affected; and there was no evidence that the purchaser was influenced thereby. It was held that the purchaser was not entitled to have the contract set aside.[3]

217. The definition of actual fraud already given is, that it is an artifice by which a person is deceived to his *disadvantage.* The emphasis upon the last word in the definition indicates that one other element of fraudulent misrepresentation yet remains to be noticed, viz., that the party complaining must have been injured thereby.[4] Fraud without damage is no ground for relief at law or in equity.[5] But any damage, however small, will be enough to set the court in motion.[6]

It must be remembered, in considering all the rules in regard to misrepresentation, that, although a misrepresentation is usually by words, it is not always so, and that deceit by acts will be

[1] Pulsford *v.* Richards, 17 Beav. 87, 96; Morris Canal Co. *v.* Emmett, 9 Paige, 168; Levick *v.* Brotherline, 24 P. F. Sm. 157; Masterton *v.* Beers, 6 Robertson, 368; 1 Sweeney, 406; Bryan *v.* Hitchcock, 43 Mis. 531; Klopenstein *v.* Mulcahy, 4 Nev. 296; Daniel *v.* Mitchell, 1 Story, 172; Percival *v.* Harger, 40 Iowa, 286; 2 Parsons on Contracts, 769; Kerr on Fraud and Mistake, 73, 74.

[2] See Geddes *v.* Pennington, 5 Dow, 159; Winston *v.* Gwathmey, 8 B. Mon. 19; Perry on Trusts, § 174.

[3] Percival *v.* Hargar, 40 Iowa, 286.

[4] See Wells *v.* Waterhouse, 22 Maine, 131; Branham *v.* Record, 42 Ind. 181; Rogers *v.* Higgins, 57 Ill. 244; Lindsey *v.* Lindsey, 34 Miss. 432; Taylor *v.* Guest, 58 N. Y. 262; Bigelow on Fraud, 85.

[5] Clark *v.* White, 12 Peters, 178; Abbey *v.* Dewey, 1 Casey, 413; Marr's Appeal, 28 P. F. Sm. 69; Kerr on Fraud and Mistake, 94.

[6] Smith *v.* Kay, 7 H. L. Cas. 750, 775.

an equally good ground for relief.[1] And it must also be remembered that the rules above discussed are not to be rigidly adhered to, where to do so would be to allow fraud to go unpunished. Equity, as already stated, will redress fraud in whatever shape it may appear, and any misrepresentation amounting, in the eyes of a chancellor, to a fraud, will induce the court to act.[2]

If false and fraudulent representations are made by an agent, the principal, although he be innocent of the fraud, cannot derive any benefit from the transaction founded on such misrepresentation.[3] He must either repudiate the whole transaction, or, if he adopts it, he must be answerable for his agent's conduct;[4] for where once a fraud has been committed not only is the person who committed the fraud precluded from deriving any benefit from it, but every innocent person is so likewise, unless he has innocently acquired a subsequent interest.[5] And, on the other hand, under some circumstances a party who has been induced to enter into an agreement by the misrepresentations of an agent, is entitled to have the contract rescinded. Thus where subscriptions to the capital stock of a company have been induced by the fraudulent representations or statements of an agent appointed to obtain subscriptions, they may be avoided by the subscriber.[6]

218. Before leaving the subject of fraud which arises from facts and circumstances of imposition, notice must be taken of a class of cases in which the effect of the fraud has been held to be to create a trust—the party committing the fraud being termed a trustee *ex maleficio*;[7] and such a trust will arise in

[1] Crawshay *v.* Thompson, 4 M. & G. 387. See McCall *v.* Davis, 6 P. F. Sm. 435; Kerr on Injunctions, 474.

[2] See Kuelkamp *v.* Hidding, 31 Wis. 503.

[3] See remarks of Lord Westbury in New Brunswick Railway Co. *v.* Conybeare, 9 H. L. Cas. 726, and by Lord Cranworth, Id. 739; and of Lord Kingsdown in Bristow *v.* Whitmore, 9 H. L. Cas. 418. See, also, Mundorff *v.* Wickersham, 13 P. F. Sm. 89; Elwell *v.* Chamberlin, 31 N. Y. 611; Concord Bank *v.* Gregg, 14 N. Hamp. 331; Kerr on Fraud and Mistake, 111.

[4] See Fitzsimmons *v.* Joslin, 21 Verm. 129. The case of Cornfoot *v.* Fowke, 6 Mees. & Wels. 358, can scarcely now be considered law.

[5] Scholefield *v.* Sempler, Johns. Ch. 155; Hartopp *v.* Hartopp, 21 Beav. 259.

[6] Crossman *v.* Penrose Ferry Bridge Co., 2 Casey, 69. See also Custar *v.* Titusville Gas and Water Co., 13 P. F. Sm. 385.

[7] See *ante*, § 91.

spite of the statute of frauds, or, to speak more correctly, the statute will not be held to apply to cases of that description.

It has been already said, in discussing the nature of resulting trusts,[1] that where no money is advanced by the beneficial owner and there is nothing more in the transaction than is implied from the violation of a parol agreement, equity will not decree the purchaser to be a trustee. This is true where there is no fraud; but not where there is fraud. In the latter case, a constructive trust will arise in favor of the party to whom the parol promise has been made. Thus, in Cook *v.* Cook,[2] J.'s land being about to be sold by the sheriff, he asked P. to buy it in for him. P. agreed to do so, and informed other bidders at the sale of the arrangement, and thereby induced them to desist from bidding. It was held that he took the property as trustee for J.[3] So, also, where a testator devised real estate to his daughter by her persuasion and under her promise that on her death one-half of it should pass to the children of her sister, it was held that a trust *ex maleficio* arose.[4] Other instances of the rule may be found in the notes.[5] The ground of these decisions is that the statute of frauds is not to be used as a shelter for fraud;[6] and that where a party has by his promise to buy or hold or dispose of real estate for the benefit of another induced action or forbearance by reliance upon such promise, it would be a fraud that the promise should not be enforced; and that the method of enforcement will be through the machinery of a trust.

[1] *Ante*, § 80. See, also, Kistler's Appeal, 23 P. F. Sm. 398.

[2] 19 P. F. Sm. 443.

[3] See, also, Brown *v.* Dysinger, 1 Rawle, 408; Seylar *v.* Carson, 19 P. F. Sm. 81; Boynton *v.* Houster, 23 Id. 453; Beegle *v.* Wentz, 5 Id. 369; Seechrist's Appeal, 16 Id. 237; Thomson's Lessee *v.* White, 1 Dall. 447; Wolford *v.* Herrington, 24 P. F. Sm. 3. But it seems that this rule will apply to those cases only in which the party who relies upon the verbal promise has an interest in the land. See Wolford *v.* Herrington, 5 Norris, 39; overruling the dicta in Wolford *v.* Herrington, *supra*.

[4] Church *v.* Rosland, 14 P. F. Sm. 443.

[5] Squier's Appeal, 20 P. F. Sm. 266.

[6] See Haigh *v.* Kaye, L. R., 7 Ch. 469.

SECTION II.

FRAUD ARISING FROM THE INTRINSIC NATURE OF THE TRANSACTION.

219. Contracts void by reason of their terms; Inadequacy of consideration.
220. Bargains by reversioners and expectant heirs.
221. Change of the law in England.
222. Usurious contracts.
223. Gambling contracts.
224. Contracts void by reason of their subject-matter; *Ex turpi causa non oritur actio.*
225. Gifts in restraint of marriage; rule of the Roman Law.
226. Conditions in general restraint of marriage.
227. Conditions in partial restraint.
228. Contracts in restraint of trade.
229. Sales of public offices.

219. The second of the classes into which frauds were divided in Chesterfield *v.* Janssen, embraces those cases in which fraud is presumed to arise from the intrinsic nature and subject of the transaction itself, without any violation of fiduciary relations.

A transaction may be inherently fraudulent—that is to say, its fraudulent character may be inferred from its very nature—for one of two reasons, either, first, because of its *terms;* or secondly, because of its *subject matter.*[1]

And, first, a contract may be inherently fraudulent from its very terms. Of contracts of this kind, instances will be found in those cases in which inadequacy of consideration sometimes justifies a rescission.

Ordinarily, inadequacy of consideration will be insufficient to set a bargain aside, or to justify a refusal to enforce its specific performance.[2] Where, however, the inadequacy is so great as

[1] It will be observed that many of the contracts which are discussed in this section are of an *illegal*, rather than of a strictly *fraudulent* nature. The relief, however, which equity affords in such cases is usually considered as falling under the head of fraud (see 1 Story's Eq. Jurisp., chap. vii.), and is, therefore, so treated in the present work.

[2] Harrison *v.* Guest, 6 De G., M. & G. 424; 8 H. L. Cas. 481; Erwin *v.* Parham, 12 How. 197; Slater *v.* Maxwell, 6 Wallace, 273; Osgood *v.* Franklin, 2 Johns. Ch. 1, 23; Davidson *v.* Little, 10 Harris, 245; Cummings's Appeal, 17 P. F. Sm. 404; Bedel *v.* Loomis, 11 N. Hamp. 9; Park *v.* Johnson, 4 Allen, 259; Lee *v.* Kirby, 104 Mass. 420, 428; Hemingway *v.* Cole-

to "shock the conscience" (which is the phrase usually employed), the contract may be rescinded. Cases, indeed, very rarely occur in which inadequacy of consideration exists alone as a ground for rescission; for it is but seldom that a man would make a bargain of such a character, unless he were deceived by actual fraud, or were deficient in intellect, or were subject to undue influence, all of which circumstances would of themselves call for equitable interposition.[1] A case, therefore, of fraud from inadequacy of consideration, pure and simple, and unmixed with any other kind of fraud, is of very rare occurrence. Nevertheless the rule must be considered as well settled, although rather by dicta than by decisions, that a transaction will be set aside if there is "an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it."[2]

The relief, however, in such cases is granted (it is said) not on the ground of inadequacy of consideration, but on the ground of fraud as evidenced thereby.[3]

Equity, moreover, will sometimes refuse to enforce the specific performance of a contract, where the consideration is grossly inadequate, although it might not interfere to rescind the contract if executed.[4]

man, 49 Conn. 390; 3 Cowen, 445; Wintermute *v.* Snyder, 2 Green, Ch. 489; Weber *v.* Weitling, 3 C. E. Green, 441; Shepherd *v.* Bevin, 9 Gill, 32; Cribbins *v.* Markwood, 13 Grat. 495; Butler *v.* Haskell, 4 Dess. 651; White *v.* Flora, 2 Tenn. 426; January *v.* Martin, 1 Bibb, 586; Steele *v.* Worthington, 2 Ohio, 182; Warner *v.* Daniels, Wood & Min. 92; 1 Sugden V. and P., (8th Am. ed.), 419.

[1] See Haygarth *v.* Wearing, L. R., 12 Eq. 320.

[2] Per Ld. Thurlow in Gwynne *v.* Heaton, 1 Bro. C. C. 8. See, also, James *v.* Morgan, 1 Lev. 111 (the horseshoe case); Summers *v.* Griffiths, 35 Beav. 27; Byers *v.* Surget, 19 How. 303; Eyre *v.* Potter, 15 Id. 60; Osgood *v.* Franklin, 2 Johns. Ch. 1; Hodgson *v.* Farrell, 2 McCart. 88; Morriso *v.* Philliber, 30 Mo. 145; Mitchell *v.* Jones, 50 Id. 438; Macoupin Co. *v.* People, 58 Ill. 191; Madison Co. *v.* People, Id. 456; Gifford *v.* Thorn, 1 Stock. 702; Weist *v.* Garman, 3 Del. Ch. 422; Butler *v.* Haskell, 4 Dessaus. 651; Hamet *v.* Dundass, 4 Barr, 178; Davidson *v.* Little, 10 Harris, 245; Sime *v.* Norris, 8 Phila. R. 84; Coffee *v.* Ruffin, 4 Cold. 507; Tally *v.* Smith, 1 Id. 290; Kelly *v.* Maguire, 15 Ark. 555; Case *v.* Case, 26 Mich. 484; Dunn *v.* Chambers, 4 Barb. 376; Taylor *v.* Atwood, 47 Conn. 498; Brown *v.* Hall, 14 R. I. 249.

[3] Kerr on Fraud and Mistake, 187. See, also, Bigelow on Fraud, 137.

[4] See Graham *v.* Pancoast, 6 Casey, 97; Osgood *v.* Franklin, 2 Johns. Ch. 123; Eastman *v.* Plumer, 46 N. Hamp. 464; though see Powers *v.* Mayo, 97 Mass. 180. See, also, *post*, § 374, and cases there cited.

220. There was, however, until recently, an important class of cases in which inadequacy of consideration had been held sufficient to set the contract aside, although not amounting to that gross and shocking inequality mentioned above.

These were cases of sales of their interests by heirs and reversioners.[1] The law upon the subject was altered by statute of 31 & 32 Vic., c. 4; but as the former English doctrines have been considered and adopted in several decisions in this country, it will be proper to notice them. Heirs and reversioners were supposed in the eye of the law to be so liable to imposition, and to be so exposed to chances of being induced to make hard and unfair agreements touching the disposition of their expectant interests, that it has been deemed a matter of policy to lay it down as a general rule, that he who deals with them has cast upon him the burden of showing that the purchase was a fair one, and the price paid a reasonable sum, and of the full value.

Heirs and reversioners are very often driven by great distress to make these bargains, and those who deal with them are prone to take an inequitable advantage of their condition, and the parties do not stand upon equal terms. It has, therefore, been found necessary to lay down the rule, that in all these transactions distress and consequent inequality will be presumed to exist, and the *onus* of proving that the price is an adequate one is thrown on the purchaser.[2]

[1] See Webster *v.* Cook, L. R., 2 Ch. 546. Though in some cases it has been held that the rule stated in the text does not apply to reversioners. Cribbins *v.* Markwood, 13 Grat. 495. See Nevill *v.* Snelling, 43 L. T. Rep. N. S. 244.

[2] Shelly *v.* Nash, 3 Maddocks, 235; Earl of Aylesford *v.* Morris, L. R., 8 Ch. 490; O'Roke *v.* Bolingbroke, L. R., 2 App. Cas. 814–834 (where the rule as to the *onus probandi* was recognised although it was held by a majority of the Lords—Lord Hatherly dissenting—that the burden of proof had in that case been satisfied); Savery *v.* King, 5 H. L. Cas. 627; Edwards *v.* Burt, 2 De G., M. & G. 55. See, also, Jenkins *v.* Pye, 12 Pet. 241; Butler *v.* Haskell, 4 Dessaus. 651; Boynton *v.* Hubbard, 7 Mass. 112; Poor *v.* Hazelton, 15 N. Hamp. 564; Larrabee *v.* Larrabee, 34 Maine, 477; Power's Appeal, 13 P. F. Sm. 443; Mastin *v.* Marlow, 65 N. C. 695; Lowry *v.* Spear, 7 Bush. 451; Varick *v.* Edwards, 1 Hoff. Ch. 382; Fitch *v.* Fitch, 8 Pick. 480; Trull *v.* Eastman, 3 Met. 121; Nimmo *v.* Davis, 7 Tex. 26; Needles *v.* Needles, 7 Ohio N. S. 432; Butler *v.* Duncan, 47 Mich. 94; Notes to Chesterfield *v.* Janssen, 1 Lead. Cas. Eq. 428; 1 Sug. V. and P. 426 (8th Am. ed.). In some cases the court will direct an inquiry as to the value of the reversionary interest. 1 Sug. V. and P. 427.

Indeed in some cases the court of chancery in England has extended its protection to expectant heirs to a degree which almost incapacitated them from binding themselves by any contract; and bargains of their inheritance have been set aside, although the conduct of the purchaser may have been entirely unimpeachable. "There was nothing dishonorable or immoral in the defendant's conduct," said Sir William Grant, in a case which well illustrates the extent to which the English doctrine was carried, "but he has obtained a bargain of which upon the principles of this court he cannot avail himself."[1] A decree was accordingly made directing a reconveyance of the premises in question, upon payment of the loan with interest.

It was at one time held that the circumstance that the father knew of the design of the son to dispose of his expectant interest, and did not oppose the same, would alter the general rule, and render the transaction unimpeachable.[2] But the truer doctrine seems to be that the right to set the transaction aside is the son's equity, and cannot be taken away from him by any knowledge or consent on the part of the father.[3]

Where there is a family arrangement made between father and son in regard to the disposition of the reversionary interest, in which no undue influence appears to have been used, the transaction will be upheld.[4]

Sales of reversionary interests may be made at auction, or, it seems, after a fair valuation;[5] and the rule as to the voidability of these contracts does not apply in cases where the holder of the particular estate joins with the reversioner, for *there*, both owners constitute, as it were, one party controlling the whole fee, and dealing with the purchaser on equal terms.[6]

Where any transaction with an expectant heir or reversioner is set aside on the sole ground of inadequacy of price, the court will only give relief upon the payment of the sum actually ad-

[1] Evans *v.* Peacock, 16 Ves. 512.

[2] King *v.* Hamlet, 2 My. & K. 456, approved in 3 C. & F. 218.

[3] See the remarks of Lord Chancellor Selbourne in Earl of Aylesford *v.* Morris, L. R., 8 Ch. 491; Sugden, V. and P. 316 (11th ed.). Note to Chesterfield *v.* Janssen, 1 Lead. Cas. Eq. 485.

[4] Tweddell *v.* Tweddell, T. & R. 13; 1 Sug. V. and P. (8th Am. ed.).

[5] Shelly *v.* Nash, 3 Mad. 232; Lord *v.* Jeffkins, 35 Beav. 7.

[6] See notes to Chesterfield *v.* Janssen, 1 Lead. Cas. Eq. 606 (4th Eng. ed.)

vanced with interest and costs. This is in accordance with the maxim explained in the Introduction that he who seeks equity must do equity.[1] The application of this maxim to the class of transactions now under consideration is thoroughly established in England, and would seem to be recognised, as a general rule in this country.[2]

221. It was stated above that the law upon the subject of sales by reversioners has recently been altered in England. This was effected by stat. 31 & 32 Vic., c. 4, by which it was enacted that no purchase made *bona fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall be hereafter opened or set aside merely on the ground of undervalue. Under a proper construction of the language of this act, however, it has been held that the exception in the statute leaves *unfair* dealings untouched, and that the statute has not repealed the doctrines of the court of chancery, by which protection is thrown around unwary young men in the hands of unscrupulous persons, ready to take advantage of their necessities.[3]

Contracts made by sailors for the disposition of their prize money stand very nearly, if not quite, upon the same footing as the transactions which have just been considered; and if courts of equity will not in all cases set aside agreements of this description, they will at least do so where the slighest inequality appears, or any undue advantage whatever has been taken.[4]

222. Another class of contracts which are fraudulent because of their terms, are contracts which stipulate for usury. Usury

[1] *Ante*, page 62.

[2] Wharton *v.* May, 5 Vesey. 27 (and see the decree in that case as stated in same volume pp. 68 and 69); Evans *v.* Peacock, 16 Id. 512; Boyd *v.* Dunlap, 1 Johns. Ch. 478; Williams *v.* The Savage Manuf. Co., 1 Maryl. Ch. 306; 3 Id. 420; Boynton *v.* Hubbard, 7 Mass. 112; American note to Chesterfield *v.* Janssen, 1 Lead. Cas. Eq. 836 (4th Am. ed.). See Seylar *v.* Carson, 19 P. F. Sm. 81, and Smull *v.* Jones, 6 Watts & Serg. 128, for decisions which seem to be at variance with this general doctrine, and the remarks on those cases in 1 Lead. Cas. Eq. 836.

[3] Miller *v.* Cook, L. R., 10 Eq. 641; Tyler *v.* Yates, L. R., 6 Ch. 665; Earl of Aylesford *v.* Morris, 8 Id. 484. It has also been held that the repeal of the usury laws in no way affects the jurisdiction of the court in reference to dealings with expectant heirs. Croft *v.* Graham, 2 D. J. & S. 155.

[4] Taylour *v.* Rochfort, 2 Ves. Sr. 281; How *v.* Weldon, Id. 516, 518; Baldwin *v.* Rochford, 1 Wils. 229; Story's Eq. Jurisp., § 332.

is defined to be an exorbitant profit for the use of money;[1] and it is a subject which, in most countries, is regulated by statute.

No usury laws now exist in England, the statutes forbidding it having been repealed. It has, nevertheless, been decided that the repeal of these laws did not alter the doctrine by which the court of chancery affords relief against improvident and extravagant bargains.[2]

By the former English acts, contracts tainted with usury were absolutely void. In some of the United States the usurious excess over the lawful rate alone is void.

Courts of equity, following the rule of law laid down by the statute, will not assist a lender to enforce a usurious contract;[3] and it will, on the other hand, aid the borrower to recover back the amount paid for usurious interest, or may decree a surrender of securities left as collateral for a usurious debt.[4]

But if the borrower, before repayment of the loan, comes into court to have the transaction set aside, the court will afford relief only upon condition of paying the amount actually due, *i. e.*, the principal sum borrowed with lawful interest.[5]

Equity will also relieve in cases where the usurious loan assumes the appearance of a sale. The goods in such a transaction are usually taken by the borrower at an exorbitant rate on credit, and are then re-sold by him, so that the transaction substantially amounts to a loan of the sum realized by the resale, at a usurious interest. In such a case equity will set the transaction aside, upon repayment of the sum produced by the resale, with lawful interest.[6]

223. Still, a third class of contracts, which are regarded with disfavor both at law and in equity, on account of the iniquity of their terms, is that which embraces gambling transactions.

[1] 2 Black. Com. 456; Duquesne Bank's Appeal, 24 P. F. Sm. 426.

[2] Earl of Aylesford *v.* Morris, L. R., 8 Ch. 484. See, also, Sime *v.* Norris, 8 Phila. 84.

[3] Fanning *v.* Dunham, 5 Johns. Ch. R. 142.

[4] Peters *v.* Mortimer, 4 Ed. Ch. R. 279.

[5] See Whitehead *v.* Peck, 1 Kelly, 140; Ballinger *v.* Edwards, 4 Ired. Eq. 449; Rogers *v.* Rathbun, 1 Johns. Ch. 367; Williams *v.* Fitshugh, 37 N. Y. 444; Sporrer *v.* Eifler, 1 Heisk. 633. In cases of oppression and fraud the lender may be compelled to prove his accounts; Barrow *v.* Rhinelander, 1 Johns. Ch. 557.

[6] Waller *v.* Dalt, 1 Ch. Ca. 276; 1 Dick. 8; Barny *v.* Beak, 2 Ch. Ca. 136; Barker *v.* Vansommer, 1 Bro. C. C. 149.

A bet at common law was good, unless there was some special ground of invalidity by reason of public policy—as, for example, a wager upon elections.

An act of parliament passed in the reign of George II. prohibited wagering contracts of insurance; and by statute of 8 & 9 Vic., c. 109, § 18, all agreements by way of gaming or wagering are made null and void.[1]

In the United States the general tendency is to regard all gaming and wagering as opposed to public policy, and therefore void. The subject is regulated by statutes in most of the States.[2]

The rule, both at law and in equity, in regard to gambling transactions, now seems to be that the courts will not only refuse to lend their aid for the purpose of enforcing such contracts, but they will not assist the losing party in setting the contracts aside or recovering back the money paid. The maxim applicable to such cases is *potior est conditio possidentis*.[3] Equity may, however, enjoin a plaintiff from enforcing a judgment which has been obtained in a gaming contract.[4]

It had been decided in England, that a bond given to secure a sum of money lost at play might be ordered to be delivered up.[5] But there is a decision the other way in the United States.[6]

Time contracts in stocks which are merely, in substance, gaming contracts, cannot be enforced.[7] It is otherwise if they are *bonâ fide* purchases and sales.[8]

224. Contracts may sometimes be presumed to be fraudulent

[1] "Provided that this prohibition shall not apply to any subscription or agreement to subscribe towards a plate, prize, or sum of money awarded to the winner of any lawful game, sport, pastime, or exercise." Horse races, steeple chases, and foot races are considered among the lawful games. See Addison on Contracts, 893.

[2] See Wilkinson *v.* Tousley, 16 Minn. 299.

[3] Bosanquett *v.* Dashwood, Cas. temp. Talb. 41; Adams *v.* Barrett, 5 Georgia, 404; Thomas *v.* Cronise, 16 Ohio, 54; Cowles *v.* Raguet, 14 Ohio, 55; Spalding *v.* Preston, 21 Verm. 9; Gotwalt *v.* Neal, 25 Maryl. 434. See, also, Pope *v.* Chafee, 14 Rich. Eq. 69; though see Rawden *v.* Shadwell, Ambler, 268, and Chapin *v.* Dake, 57 Ill. 295. See 2 Kent. Com. 467.

[4] Skipwith *v.* Strother, 3 Rand. 214.

[5] Rawden *v.* Shadwell, Ambler, 268.

[6] Cowles *v.* Raguet, 14 Ohio, 55.

[7] Brua's Appeal, 5 P. F. Sm. 294; Fareira *v.* Gabell, 7 Norris, 89.

[8] Smith *v.* Bouvier, 20 P. F. Sm 325; Kirkpatrick *v.* Bonsall, 22 Id. 155 · Maxton *v.* Gheen, 25 Id. 166; Lynn *v* Culbertson, 83 Ill. 33; Rudolph *v.* Winters, 7 Nebraska, 126.

(or rather incapable of being enforced) from their subject-matter; and of transactions of this description illustrations may be found in agreements to waive an equity of redemption, marriage brokage contracts, contracts in restraint of marriage, or of trade, and contracts for procurement of office.

As to the first of these contracts, the nature of an equity of redemption has been already explained in the chapter devoted to mortgages, and the reasons for the policy of the law, prohibiting any stipulations in the mortgage by which the right should be waived, were at the same time attempted to be elucidated.

It will be sufficient to say, here, that this doctrine should properly receive this passing notice under the head of fraud, as it was introduced for the purpose of preventing impositions upon the weakness and necessities of debtors. Any clause in a mortgage, or any collateral agreement, by which the mortgagee's equity of redemption is in any way clogged, will be considered as a fraud upon his rights, and will be disregarded in a court of equity.[1]

As to the other cases mentioned above, they all fall under the operation of the general maxim *ex turpi causâ non oritur actio*, which is recognised in equity, sometimes passively by the refusal of the courts to entertain any bill brought to enforce such a contract, and sometimes actively, by entertaining a bill filed for the purpose of having an illegal security, or rather a security given upon an illegal consideration, delivered up and cancelled; or for the purpose of enjoining any action under and by virtue of the illegal contract.

For example, marriage brokage contracts (which is the name usually given to agreements for negotiating marriages), while they were good at the civil law,[2] have been held illegal at common law,[3] and are regarded as utterly void in equity.[4]

Contracts in restraint of marriage,[5] and contracts for future

[1] *Ante*, Chap. on Mortgages, p. 200.

[2] Matchmakers (*proxenetæ*) were allowed to receive a reward for their services.

[3] Hall *v.* Potter, 3 Lev. 411; 1 Eq. Cas. Ab. 89; 3 P. Wms. 76; Shower's Parl. Cas. 76; Boynton *v.* Hubbard, 7 Mass. 112.

[4] Cole *v.* Gibson, 1 Ves. Sr. 503; White *v.* Nuptial Benefit Union, 76 Alab. 251; Johnson *v.* Hunt, 22 Am. Law Reg. 777–780; Story's Eq. Juris., § 263.

[5] See notes to Scott *v.* Tyler, 2 Lead. Cas. Eq. 105.

separation[1] are equally, although for different reasons, illegal. A covenant not to marry any person except the covenantee is void at law;[2] and a bond, with a similar condition, has been ordered to be cancelled in chancery.[3]

225. Gifts in restraint of marriage, that is, gifts bestowed upon condition that they are to be forfeited in the event of marriage in general, or of some particular marriage, are of frequent occurrence, and may properly be noticed in this connection. The authorities upon this subject are not all to be reconciled, and it is difficult to state the law with entire precision. This confusion has arisen from the attempts to import the doctrine of the civil law upon this subject into the law of England.[4]

The civil law rule was that conditions in restraint of marriage were void.

The origin of the rule, as stated by the Chancellor (Lord Loughborough) in Stackpole *v.* Beaumont,[5] was that in the Roman Empire the depopulation occasioned by the civil war led to habits of celibacy; and to correct this evil, in the time of Augustus, the Julian law (which went too far and was corrected by the *Lex Papia Poppœa*), not only offered encouragement to marriage, but laid heavy impositions upon celibacy. To impose even partial restraints therefore upon marriage was to act directly contrary to this law, and hence such restraints were necessarily invalid.

No such reasons existed at common law, and, hence, so far as real estate was concerned, the rule of the civil law was not followed, except that conditions in entire restraint of marriage were considered opposed to the policy of the law, and therefore void.[6] But the succession to personalty having fallen into the hands of the ecclesiastical courts, and these having a great leaning towards the Roman law, the rule as to *that* species of property was the same as in the civil law.[7] The tendency, how-

[1] As to trusts for future separation, see *ante*, p. 161.

[2] Lowe *v.* Peers, 4 Burr. 2225.

[3] Baker *v.* White, 2 Vern. 215.

[4] See notes to Scott *v.* Tyler, 2 Lead. Cas. Eq. 208 (4th Eng. ed.).

[5] 3 Ves. 96.

[6] See Morley *v.* Rennoldson, 2 Hare, 570; notes to Scott *v.* Tyler, 2 Lead. Cas. Eq. 215 (4th Eng. ed.).

[7] See Stackpole *v.* Beaumont, 3 Ves 96.

ever, of modern decision is to bring the law in regard to personalty, in this particular, in accord with the doctrines applicable to real estate.

226. In considering this subject it will be convenient to notice, in the first place, conditions in *general* or *entire* restraint of marriage; and, secondly, those in *partial* restraint.

A condition annexed to a gift *entirely* restraining the donee from marriage is void as against public policy; and the donee will take the gift free and discharged from the condition. So far as conditions subsequent are concerned, there is no difference as to this rule between realty and personalty.[1] But in conditions precedent, although the condition be illegal or impossible, an estate in realty, according to the common law, could never vest unless the condition were complied with. Hence, if an estate in land is given when, or as soon as, the donee shall marry a particular person, the estate cannot vest until the marriage takes place. If the subject of the gift, however, is personalty, the condition although precedent being void, the donee will take it absolutely.[2]

The circumstance that there is a gift over upon non-compliance with the condition, will make no difference in the application of the above rules in regard to *total* restraints.[3]

227. Where the condition is only in partial restraint—as where it is against marrying a particular person, or before arriving at a particular age (provided, the period to which the marriage is postponed be reasonable)—it is valid, and will be enforced if there is a gift over. And this is the rule as respects realty, although there is no gift over. But in regard to personalty the rule is different, and a condition in partial restraint of marriage, if there is no gift over, will be held to be (as it is said) *in terrorem* only, and will not defeat the estate.[4] It was, however, held by Sir Wm. Page Wood, then vice-chancellor, in

[1] Morley *v.* Rennoldson, 2 Hare, 570; notes to Scott *v.* Tyler, *supra*.

[2] Keily *v.* Monck, 3 Ridg. P. C. 205; Maddox *v.* Maddox, 11 Grat. 804.

[3] See Morley *v.* Rennoldson, 2 Hare, 570.

[4] Harvey *v.* Aston, 1 Atk. 378; Mc-Ilvaine *v.* Gethen, 3 Whart. 575; Hoopes *v.* Dundas, 10 Barr, 75; Hotz's Estate, 2 Wright, 422; Cornell *v.* Lovett, 11 Casey, 100; Maddox *v.* Maddox, 11 Grat. 804; Waters *v.* Tazewell, 9 Marl. 291. Hill on Trustees, 496; (775, 4th Am. ed.).

Newton *v.* Marsden, that a condition in restraint of marriage attached to a legacy to the widow of the testator's nephew was valid.[1]

If the condition in partial restraint is precedent, it will be enforced, even if there is no limitation over.[2]

Restraints upon marriage may sometimes be enforced by way of limitation, when they would be ineffectual if put in the shape of conditions. A testator may make the period of enjoyment of his bounty as short as he pleases, and may fix the occurrence or non-occurrence of any event, no matter how absurd or arbitrary the limitation may be, as the boundary at which the estate is to cease. In such a case the particular estate will come to an end by virtue of its own limitation, and the estate in remainder will, of course, vest in possession.

If, then, an estate be given to A. until she marries, and from and after her marriage to B., the marriage of A. would not operate to defeat an estate already vested, but would simply mark the period at which a vested estate of uncertain duration is to determine.[3] In such a case the law of *conditions* has no place. Hence it is settled that a gift *durante viduitate*, with a limitation over, is valid; and that upon marriage of the widow, the party in remainder will take.[4]

The real principle of cases of this kind is, that the condition is not regarded as an arbitrary prohibition of marriage altogether, but the conditional gift is considered as made to the widow, because she is a widow, and because the circumstances would be entirely changed if she entered into a new relation.[5]

It may be added that it has been recently decided in England that a valid restraint may be imposed upon the second marriage of a man as well as upon that of a woman. The case arose for the first time in 1875 in Allen *v.* Jackson,[6] and it was there held that where

[1] 2 Johns. & H. 356. See, also, Commonwealth *v.* Stauffer, 10 Barr, 350; McCullough's Appeal, 2 Jones, 297; Phillips *v.* Medbury, 7 Conn. 568.

[2] Stackpole *v.* Beaumont, 3 Ves. 89; Hill on Trustees, 496.

[3] See Fearne on Cont. Rem. 10.

[4] See Vance *v.* Campbell's Heirs, 1 Dana, 229; Pringle *v.* Dunkley, 14 Sm. & Marsh. 16; Hughes *v.* Boyd, 2 Sneed, 512; notes to Scott *v.* Tyler, 2 Lead. Cas. Eq. 412 (3d Am. ed.), where this rule is somewhat criticized by the learned American editor.

[5] Per Wood, V. C., in Newton *v.* Marsden, 2 Johns. & H. 367.

[6] L. R., 1 C. D. 399.

a testator gave property to her niece and her niece's husband, with a proviso that if the husband survived the niece and married again the property should go over, the proviso was valid and, on the husband's second marriage, the gift over took effect.

228. Still another class of contracts, which are illegal by reason of their *nature*, are contracts in general restraint of trade.

The rule upon this subject is that a contract in general restraint of trade is void; but if in partial restraint of trade only, it may be supported, provided the restraint be reasonable, and the contract be founded on consideration.[1] The doctrine is a very old one, a case being found in the year books,[2] in which Mr. Justice Hall lost his temper at the very sight of the bond, and exclaimed with an oath, that if the plaintiff had been in court, he should have gone to prison until he had paid a fine.

The leading authority upon the subject is Mitchell *v.* Reynolds[3]—from which, and from subsequent authorities in England and in this country, it may be gathered that a restraint upon trade in order to be good at law must be, in the first place *partial;* in the second place, *reasonable,* that is, such a restraint only as may be necessary to protect the business of the party for whose benefit the contract is made; and, thirdly, founded on a *valuable* consideration, although as to this last point it is now settled that the courts will not enter into the question of *adequacy* of consideration, unless perhaps the inadequacy is such as to stamp the agreement as an unreasonable one.[4]

A contract in restraint of trade which is, for any of the reasons stated above, obnoxious in the eye of the law, cannot (upon the general principles already referred to) be enforced in equity, and an instrument given to secure such an agreement may be decreed to be delivered up and cancelled.

Equity, moreover, is loth to enforce a contract in restraint of trade, even although it be good at law, if the terms are hard or even complex.[5]

[1] Smith on Contracts, 135, Sharswood's note.

[2] Henry VI.

[3] 1 P. Wms. 181.

[4] See notes to Mitchell *v.* Reynolds, 1 Sm. Lead. Cas. 705, and note to Zimmerman *v.* Davis, 23 Am. L. Reg. 52.

[5] Kimberly *v.* Jennings, 6 Sim. 340; Kemble *v.* Kean, 6 Sim. 335; Whittaker *v.* Howe, 3 Beav. 383; Kerr on Injunctions, 506, 514; *post,* Part III., Chap. II.

Thus, in a Pennsylvania case the defendant in consideration of the complainant's instructing him in the art of making platform scales, and of employing him at a certain sum per diem, agreed not to make said scales for any person other than the plaintiff (except with the latter's written consent) upon a penalty for each scale manufactured in violation of the agreement. The defendant broke the contract, and the plaintiff then filed a bill for an account and payment. The prayer was refused and the bill dismissed, not only on the ground that the condition was one in general restraint of trade, and therefore void at law, but also because "a chancellor would regard the hardship of the bargain and the prejudice to the public and would withhold his hand from enforcing it, for such decrees are always of grace and not of right."[1]

Contracts in restraint of trade, however, if they are partial, reasonable and founded on a valuable consideration, and not for any special reason unjust or inequitable, will be enforced in equity.[2]

Combinations entered into for the purpose of preventing the parties thereto, or others, from engaging in trade, are illegal.[3]

Thus in the Morris Run Coal Co. *v.* Barclay Coal Co.,[4] a contract was entered into between five coal companies by which it was agreed that the coal market in certain regions was to be divided among the contracting parties in certain proportions, with a proviso that the several companies should sell coal only to the extent of their proportion, and only at prices adjusted by a committee. The result of this combination was to control the

[1] Keeler *v.* Taylor, 3 P. F. Sm. 467. See further as to contracts of this kind Gompers *v.* Rochester, 6 Id. 194; McClurg's Appeal, 8 Id. 51; Hall's Appeal, 10 Id. 458; Harkinson's Appeal, 28 Id. 196.

[2] Morris *v.* Colman, 18 Ves. 437, Morse *v.* Morse, 103 Mass. 73; Taylor *v.* Blanchard, 13 Allen, 370; Leather Cloth Co. *v.* Lorsont, L. R., 9 Eq. 345. See Cruttwell *v.* Lye, 17 Ves. 335; and Allsopp *v.* Wheatcroft, L. R., 15 Eq. 59.

[3] Story's Eq., § 292; Stanton *v.* Allen, 5 Denio, 434; Hilton *v.* Eckersley, 32 Eng. L. and Eq. R. 198; 34 Id. 224.

[4] 18 P. F. Sm. 173. See also Oregon Steam Nav. Co. *v.* Winsor, 20 Wal. 64; Maguire *v.* Smock, 42 Ind. 1; Bowen *v.* Matcheson, 14 Allen, 99; Carew *v.* Rutherford, 106 Mass. 1; Gale *v.* Kalamazoo, 23 Mich. 344; Sampson *v.* Shaw, 101 Mass. 145 (an agreement to corner stocks); Crawford *v.* Wick, 18 Ohio, (N. S.) 190.

value of coal in an extensive market, and to cause it to bring prices which it would not have commanded had it been left to the natural laws of trade. It was, therefore, held that a combination so wide in its scope, general in its influence, and injurious in effects, was a contract against public policy, illegal, and therefore void.[1]

Upon the same general principle, bonds restraining the right of alienation have been ordered to be delivered up, as opposed to public policy.[2]

229. The last of the contracts which will be noticed as being void on the ground of illegality in their subject-matter, are contracts for the procurement of sale of public offices. Sir John Strange, M. R., in his opinion in Chesterfield *v.* Janssen,[3] says: "So, in bargains to procure offices, neither of the parties is defrauded or unapprised of the terms, but it seems to introduce unworthy objects into public offices; and, therefore, for the sake of the public the bargain is rescinded."

The conduct of equity in such a case is but in accordance with a general principle by which courts of chancery, and, indeed, every other tribunal, would discourage, in every way, contracts opposed to good morals and sound public policy. The examples of illegal contracts already given, are but instances of this general principle; and it might not be too much to say that in every case where rules of public policy are violated, and where relief could be afforded by the machinery of a court of chancery, and where a full, adequate and complete remedy could not be had at common law, equity will interpose for the purpose of restraining an action brought to enforce such a contract, or to compel the surrender of the instrument by which it had been secured.

[1] See, also, Arnot *v.* Pittston & Elmira Coal Co., 68 N. Y. 558; and, upon the general subject, Hoffman *v.* Brooks, 23 Am. Law Reg. 648, and note; and article in 24 Id. 217 and 281.

[2] Jervis *v.* Bruton, 2 Vern. 251; Freeman *v.* Freeman, 2 Vern. 233; Pool's Case, Moore, 810.

[3] 1 Atk. 301. See, also, Boynton *v.* Hubbard, 7 Mass. 119.

SECTION III.

FRAUD PRESUMED FROM THE RELATIONS OF THE PARTIES.

230. Mental disability; drunkenness; *duress.*
231. Undue influence; gifts; *Huguenin* v. *Baseley.*
232. Contracts; *Tate* v. *Williamson.*
233. Parties between whom confidential relation ordinarily exists.
234. Guardian and ward.
235. Parent and child.
236. Solicitor and client.
237. Trustee and *cestui que trust.*
238. Fiduciary can make no profit; *Bank* v. *Tyrrell.*
239. Promoters of companies.

230. The third species of fraud, according to Lord Hardwicke's classification, is that which is presumed from the circumstances and condition of the parties contracting; and this may, perhaps, be again subdivided into two classes, viz., first, where one of the parties is laboring under some mental disability; and, secondly, where the transaction takes place under undue influence.

As to the first of the two classes, mere weakness of mind is not of itself a sufficient ground for equitable interference. It would be impossible to carry on the business of the courts, if they undertook to interfere in every case in which a superior and more astute intellect obtained an advantage in a bargain over a dull or feeble mind.[1] But an entire absence of intellectual power, or great mental aberration will be sufficient to cause a contract to be rescinded.[2] Hence, the contracts of idiots and lunatics are void, or, at least, voidable.[3] And while mere weakness of mind will not be enough, of itself, to justify a rescission, it will, nevertheless, always constitute an important

[1] Osmond *v.* Fitzroy, 3 P. Wms. 129; Ex parte Allen, 15 Mass. 58; Hadley *v.* Latimer, 3 Yerg. 537; Rogers *v.* Higgins, 57 Ill. 247; Killian *v.* Badgett, 27 Ark. 166; Mann *v.* Betterly, 21 Verm. 326; Thomas *v.* Sheppard, 2 McCord Eq. 36; Rippy *v.* Gant, 4 Ired. Eq. 443; Nace *v.* Boyer, 6 Casey, 90; Aiman *v.* Stout, 4 Wright, 144; Hyer *v.* Little, 5 C. E. Green, 443; Lozear *v.* Shields, 8 Id. 509; Stiner *v.* Stiner, 58 Barb. 643.

[2] Allis *v.* Billings, 6 Met. 415; Breckenridge *v.* Ormsby, 1 J. J. Marsh. 239; Desilver's Est., 5 Rawle, 111; Bensell *v.* Chancellor, 5 Whart. 376; Beals *v.* See, 10 Barr, 56.

[3] See Hill on Trustees, 46 (73, 4th Am. ed.). See, also, Howe *v.* Howe, 99 Mass. 88.

element in actual fraud.[1] If, therefore, a transaction be in the slightest degree tainted with deceit, the intellectual imbecility of the injured party will be laid hold of by a chancellor to make out a case of actual fraud, which might otherwise be incapable of proof.[2] Whatever be the cause of the mental weakness—whether it arise from permanent injury to the mind, or temporary illness, or excessive old age—it will be enough to make the court scrutinize the contract with a jealous eye; and any unfairness or overreaching will be promptly redressed.[3] As was said by the Supreme Court of the United States in a recent case, "wherever there is great weakness of mind in a person executing a conveyance of land arising from age, sickness or any other cause, though not amounting to an absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party or his representatives or heirs, interfere and set the conveyance aside."[4] A mere latent suspicion of unfairness, however, will not be enough.[5]

On the other hand, it need scarcely be remarked that the mere circumstance of old age or physical feebleness, will not render a transaction fraudulent, if, in point of fact, the party is intelligent and capable.[6]

[1] Nottidge *v.* Prince, 2 Giff. 246; Baker *v.* Monk, 33 Beav. 419; Boyse *v.* Rossborough, 6 H. L. Cas. 2; Harding *v.* Handy, 11 Wheat. 103; Tracey *v.* Sacket, 1 Ohio St. 54; Whitehorn *v.* Hines, 1 Munf. 557; Whelan *v.* Whelan, 3 Cow. 537; Deatly *v.* Murphy, 3 A. K. Marsh. 472; Brogden *v.* Walker, 2 H. & J. 285; Rumph *v.* Abercrombie, 12 Ala. 64.

[2] Hutchinson *v.* Tindall, 2 Green Ch. 367; Rumph *v.* Abercrombie, 12 Ala. 64; Hunt *v.* Moore, 2 Barr, 105; Brady's Appeal, 16 P. F. Sm. 277; Huguenin *v.* Baseley, 14 Ves. 273; Harding *v.* Handy, 11 Wheat. 103; Hill *v.* McLaurin, 28 Miss. 288; Storrs *v.* Scougale, 48 Mich. 387; Hill on Trustees, 154.

[3] Highberger *v.* Stiffler, 21 Md. 338; Whelan *v.* Whelan, 3 Cow. 587; Martin *v.* Martin, 1 Heisk. 653; Brice *v.* Brice, 5 Barb. 549; Hill on Trustees, 155; Perry on Trusts, §§ 190, 191; Matthews *v.* Baxter, 28 L. T. N. S. 169.

[4] Allore *v.* Jewell, 4 Otto, 511; approved in Griffith *v.* Godey, 113 U. S. 95. See, also, Kempson *v.* Ashbee, L. R., 10 Ch. 15; Marshall *v.* Billingsly, 7 Ind. 250; Duncombe *v.* Richards, 46 Mich. 166; Moore *v.* Moore, 56 Cal. 89; Rau *v.* Van Zedlitz, 132 Mass. 164; Parkhurst *v.* Hosford, 21 Fed. Rep. 827.

[5] Hetrick's App., 58 Pa. St. 497.

[6] Gratz *v.* Cohen, 11 How. 19. See, also, Lewis *v.* Pead, 1 Ves., Jr. 19; Pratt *v.* Barker, 1 Sim. 1; 4 Russ. 507; Graham *v.* Pancoast, 6 Cas. 89; Dean *v.* Fuller, 4 Wright, (Pa.) 474; Howe *v.* Howe, 99 Mass. 88; Greer *v.* Greers, 9 Gratt. 332; Wray *v.* Wray, 32 Ind. 126; Darnell *v.* Rowland, 30 Id. 342.

Drunkenness falls under the same principles.[1] If a man is so far drunk that he is substantially *non compos mentis*, his contract will be invalid; but if there is intoxication, not so great in extent, equity will not interfere.[2] It will, however, in cases of partial drunkenness, lay hold of any circumstances tending to show actual imposition, and thus make out a case of actual fraud, especially if the drunkenness has been brought about by the contrivance of the other party to the transaction.[3]

Equity will also relieve against contracts obtained under duress, fear, apprehension or extreme distress.[4] Thus in Williams *v.* Bayley, it was held that a father, whose name had been forged by his son, and who had been appealed to, to take the amount of the liability upon himself, knowing that unless he did so his son would be exposed to a criminal prosecution with the certainty of conviction, could not be regarded as a free and voluntary agent, so as to render a security given under such a pressure valid.[5] And so, on the same grounds the deed of a married woman will be avoided, if her acknowledgment has been obtained by duress.[6]

But a bill will not lie for rescission on the ground of duress *after* the contract.

231. Passing now to the second class of cases, those, namely, in which the fraud springs from the circumstances and condition of the parties to the transaction, it may be stated, as a general rule, that relief will be afforded, in equity, in all transactions in which "influence has been acquired and abused, in which confidence has been reposed and betrayed."[8]

[1] See Co. Litt. 447, a.

[2] Gore *v.* Gibson, 13 M. & W. 623; Clifton *v.* Davis, 1 Pars. Eq. 31; Johnson *v.* Medlicott, 3 P. Wms. 131, n.; Cory *v.* Cory, 1 Ves., Sr. 19; Maxwell *v.* Pittenger, 2 Green Ch. 156; Selah *v.* Selah, 8 C. E. Green, 185; Morrison *v.* McLeod, 2 Dev. & Bat. Eq. 221; Harbison *v.* Lemon, 3 Blackf. 51.

[3] Crane *v.* Conklin, Saxt. 346; Cory *v.* Cory, 1 Ves., Sr. 19; Calloway *v.* Witherspoon, 5 Ired. Eq. 128; Phillips *v.* Moore, 11 Mo. 600; Freeman *v.* Dwiggins, 2 Jones (Eq.) 162; Shaw *v.* Thackray, 1 Sm. & Giff. 537

[4] Neilson *v.* McDonald, 6 Johns. Ch. 210; Hill on Trustees, 156.

[5] Williams *v.* Bayley, L. R., 1 H. L. Cas. 218. See Coffman *v.* Lookout Bank, 5 Lea, 232; and Jordan *v.* Elliott, 12 W. N. C. 56.

[6] McCandless *v.* Engle, 1 P. F. Sm. 309; Michener *v.* Cavender, 2 Wright, 337; Louden *v.* Blythe, 4 Harris, 532.

[7] Fulton *v.* Loftis, 63 N. C. 393.

[8] Smith *v.* Kay, 7 H. L. Cas. 750. This language of Lord Kingsdowne is

The transaction which takes place under undue influence may be either in the nature of a gift, or of a contract. In either aspect it is regarded by courts of equity with a jealous eye, but the scrutiny in cases of gifts is more severe and searching than in those of contracts.

The leading authority upon the subject of gifts which are obtained through undue influence, is Huguenin *v.* Baseley,[1] where a widow lady executed a voluntary settlement upon a clergyman who had ingratiated himself with her, and had induced her to withdraw her affairs from the hands of her solicitor by whom they had been previously managed. The settlement was set aside, on the ground of the confidential relations of the parties. "The question," said Lord Eldon, "is not whether she knew what she was doing, had done, or proposed to do, but *how the intention was produced;* whether all care and providence was placed around her, as against those who advised her, which from their situation and relation in respect to her they were bound to exert on her behalf."

So, in a modern case the court said that, had it not been for the length of time during which the transaction had been acquiesced in, and by which alone the complainant was barred, a gift from a daughter, soon after attaining twenty-one, to her father would have been set aside solely on the ground of the jealousy with which, upon principles of natural justice, and upon considerations important to the interests of society, the law examines, scrutinizes and weighs in golden scales every such transaction.[2]

even more striking than that used by Sir Samuel Romilly in his celebrated reply in Huguenin *v.* Baseley, viz., that "the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another."

[1] 14 Ves. 273; 2 Lead. Cas. Eq. 556 (4th Eng. ed.). See Kirwan *v.* Cullen, 4 Ir. Ch. R. 330; McKinney *v.* Hensley, 74 Mo. 326; Buchanan *v.* Gibbs, 26 Kansas, 277; Shaw *v.* Ball, 55 Ia. 55; and Falk *v.* Turner, 101 Mass. 494, for cases which were held *not* to fall under the doctrine of Huguenin *v.* Baseley.

[2] Wright *v.* Vanderplank, 8 De G., M. & G. 137. See, also, Turner *v.* Collins, L. R., 7 Ch. 329; Hoghton *v.* Hoghton, 15 Beav. 278; Prideaux *v.* Lonsdale, 1 De G., J. & Sm. 433; Everitt *v.* Everitt, L. R., 10 Eq. 405; Tomson *v.* Judge, 3 Drewry, 306; Broun *v.* Kennedy, 33 Beav. 133; Savery *v.* King, 5 H. L. Cas. 626; Lyon *v.* Home, L. R., 6 Eq. 655 (where a transfer of 24,000*l.* by an old lady of seventy-five to a spiritualist was set aside); Fulham *v.* McCarthy, 1 H. L. Cas. 703; Greenfield's Estate, 2 Harris, (Pa.) 507; Wistar's Appeal, 4 P. F. Sm. 63; Taylor *v.* Taylor, 8 How. 183; Slocum *v.* Marshall, 2 Wash. C. C. 397; Brock *v.* Barnes, 40

If the person who stands in the confidential relation wishes to hold the benefit conferred, he must show that the person conferring it had competent and independent advice.[1]

The same considerations, however, are not universally applicable to *testamentary* dispositions. Thus, a client may make a gift to a solicitor by will, even though the will is drawn by the solicitor, provided the will was not made under any mistake or misapprehension caused by the solicitor.[2]

Even gifts between persons who stand in no confidential relation to each other are watched with jealousy.[3]

232. Passing now from the subject of gifts to that of contracts, it may be stated, as a general rule, that a contract between parties who stand in a confidential relation to each other falls under the principle laid down by Lord Kingsdowne in Smith *v.* Kay.[4] Wherever two persons stand in such a relation that while it continues confidence is necessarily imposed by one, and the influence which necessarily grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.[5] There can be no contract between the two, except after the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish the contract, with the person so trusting him.[6] This doctrine was applied by Lord Chancellor Chelmsford in Tate *v.* Williamson, a case which well illustrates the extent and nature

Barb. 521; Gibbes *v.* N. Y. Life Ins. Co., 67 How. (Pr.) 207; Haydock *v.* Haydock, 34 N. J. Eq. 570; Cherbonnier *v.* Ebits, 56 Md. 276; Ashton *v.* Thompson, 32 Minn. 25; Caspari *v.* The First German Church, 82 Mo. 649; Todd *v.* Grove, 33 Md. 188; Turner *v.* Turner, 44 Miss. 535. But in Jenkins *v.* Pye, 12 Pet. 253, Thompson, J., declined to accede to the proposition that a conveyance from a child to a parent was *prima facie* void.

[1] Rhodes *v.* Bate, L. R., 1 Ch. 252.

[2] Hindson *v.* Weatherill, 5 De G., M. & G. 301. See Mitchell *v.* Homfray, 8 Q. B. Div. 587; also, 2 Lead. Cas. Eq. 390.

[3] 2 Lead. Cas. Eq. 582. See Cooke *v.* Lamotte, 15 Beav. 234.

[4] 7 H. L. Cas. 750; *ante*, p. 290.

[5] Tate *v.* Williamson, L. R., 2 Ch. 61, per Lord Chelmsford.

[6] Note to Fox *v.* Mackreth, 1 Lead. Cas. Eq. 171 (4th Eng. ed.). See, also, Norris *v.* Tayloe, 49 Ill. 17.

of the general principle. There Tate, a young man of twenty-three, who was the owner of a moiety of a freehold estate, and who was largely indebted, wrote to his great uncle for advice and assistance in regard to the payment of his debts. His great uncle sent a nephew, Williamson, to see Tate upon the subject, and Williamson made an offer to purchase Tate's moiety of the estate for 7000*l*, which was verbally accepted. Before any agreement was signed, Williamson obtained a valuation by a surveyor, estimating the value of the mines under the whole tract at 20,000*l*. The sale was completed without this information having been communicated to Tate. A bill was subsequently filed by Tate to set the sale aside, and a decree in his favor was made by Vice Chancellor Wood,[1] which was affirmed by Lord Chelmsford.[2] It will be observed that in this case there was no well-defined confidential relation (such as that of attorney and client, guardian and ward, and so forth) existing between the parties; but that the circumstances of the transaction were such that one man necessarily was trusted by the other, and when that confidence arose, no matter how, the duty of full disclosure immediately arose with it. It shows the truth of the remark made by Lord Cranworth in Smith *v.* Kay,[3] that the familiar cases of the influence of a parent over his child, of a guardian over his ward, of an attorney over his client, are but instances of a broad and widely applicable principle.[4]

233. Starting, therefore, with the general principle that all transactions, whether of gift or contract, made under undue influence growing out of the relations of the parties, may, if they are injurious to the confiding party, be set aside solely on

[1] The case, when before the V.-Ch.'s court, is reported, L. R., 1 Eq. 528.

[2] L. R., 2 Ch. 55. See, also, Grosvenor *v.* Sherratt, 28 Beav. 659; Cary *v.* Carey, 2 Sch. & Lef. 173; Gibson *v.* Jeyes, 6 Ves. 266; Gresley *v.* Mousley, 3 De G., F. & J. 433.

[3] 7 H. L. Cas. 771.

[4] See, also, Turner *v.* Turner, 44 Mo. 535; Harkness *v.* Fraser, 12 Fla. 341; Bayliss *v.* Williams, 6 Cold. 442; Kline *v.* Kline, 7 P. F. Sm. 120; Rockafellow *v.* Newcomb, 57 Ill. 186; McCormick *v.* Malin, 5 Blackf. 509. In this last case it was said with succinctness and accuracy that the rule under consideration applies "to all cases where confidence on the one hand, and influence on the other, exist, from whatever causes they may spring;" citing Griffiths *v.* Robins, 3 Mad. 191; Revett *v.* Harvey, 1 Sim. & S. 502. And see Shipman *v.* Furness, 69 Ala. 555; Gillespie *v.* Holland, 40 Ark. 28; Brown *v.* Burbank, 64 Cal 99. But see Hemingway *v.* Coleman, 49 Conn. 390; and Taylor *v.* Johnston 19 Ch. D. 603.

the ground of the confidential relation, and without more, let us see how this principle has been applied to the numerous cases in which such confidential relations ordinarily arise.

There are many such relations. In some of them the contract is absolutely voidable at the option of the party who is presumed to be imposed upon; while in others, the confidential relation is *primâ facie* evidence of fraud, which may, however, be rebutted by showing that the transaction is a fair and honest one, and that no improper advantage has been taken of the influence arising out of the confidential relation.

The question always is, to what extent may undue influence be presumed from the relation of the parties.

234. This presumption of undue influence is more or less strong according to the peculiar relations which the parties occupy towards each other.

The relation of guardian and ward is one in which the presumption exists, perhaps, in the highest degree; and a transaction between persons thus situated during the continuance of the relationship, and, especially, if it takes the form of a gift, can rarely, if ever, stand.[1]

The same rule applies, though not with the same stringency, to contracts between guardian and ward, and to gifts from the latter to the former, immediately after the ward has attained his majority; the reason being that the influence acquired during the continuance of the relation is still supposed to exist; and all settlements or dispositions of property are presumed to be made under undue influence.[2] If such transactions, therefore, are ever sustained, they are only so when the utmost good faith is displayed by the guardian, and when the ward is put fully in possession of all the information in regard to the property, which is necessary in order that he may make an advantageous and intelligent disposition of it. Hence, although a gift from a ward to his guardian *may* be sustained if it is shown to have been made upon a fair, serious and well-informed consideration,

[1] Farmer *v.* Farmer, 39 N. J. Eq. 211; Cowee *v.* Cornell, 75 N. Y. 99.

[2] Dawson *v.* Massey, 1 B. & B. 226; Blackmore *v.* Shelby, 8 Humph. 439; Bostwick *v.* Atkins, 3 Comst. 53; Gallatin *v.* Cunningham, 8 Cow. 361.

[3] Eberts *v.* Eberts, 5 P. F. Sm. 119; Wills's App., 10 Harris, (Pa.) 332; Wamack *v.* Austin, 1 S. Carolina, (N. S.) 421.

it will not, as a general rule, be suffered to stand, although there may not be any evidence of actual unfairness.[1] In other words, the presumption is against the bargain or the bounty; and the *onus* of showing its entire fairness is thrown upon the guardian. It *may* be valid; but inherently, and of itself, it is presumptively fraudulent. So also settlements made soon after the ward comes of age, and especially before he is in possession of his estate, are viewed by the court with a watchful and even jealous eye.[2] To sustain such settlements it must appear that the ward had sufficient time and opportunity to examine the guardian's accounts; and that he was either himself competent to make the examination, or was assisted by competent and independent advice.[3] If these elements of fairness co-exist the settlement will be allowed to stand.[4]

On the same principles a covenant by a man about to marry, to release his intended wife's mother from all account of mesne profits, was set aside.[5]

235. Transactions between parent and child, while not viewed with the same degree of suspicion as those between guardian and ward, are, nevertheless, always closely investigated in equity, and will be set aside if there is the slightest evidence of imposition or unfairness. The mere existence of the relation of parent and child (it has been said) is not, perhaps, enough to vitiate an act which, as between strangers, would have been valid;[6] but the modern English authorities seem to favor a

[1] See Hylton *v.* Hylton, 2 Ves. Sr. 547; Hatch *v.* Hatch, 9 Ves. 292; Somes *v.* Skinner, 16 Mass. 348; Richardson *v.* Linney, 7 B. Mon. 571; Andrews *v.* Jones, 10 Alab. 400; Garvin *v.* Williams, 50 Mo. 206.

[2] Says *v.* Barnes, 4 Serg. & Rawle, 112; Elliot *v.* Elliot, 5 Binney, 8; Fish *v.* Miller, 1 Hoff. Ch. 267; Waller *v.* Armistead, 2 Leigh, 11.

[3] Stanley's Appeal, 8 Barr, 431; Garvin *v.* Williams, 44 Mo. 465; In re Van Horne, 7 Paige, 46.

[4] See Sherry *v.* Sansberry, 3 Ind. 320; Hawkins's Appeal, 8 Casey, 265; Cowan's Appeal, 24 P. F. Sm. 329; Kirby *v.* Taylor, 6 Johns. Ch. 248; Meek *v* Perry, 36 Miss. 190.

[5] Hamilton (Duke of) *v.* Lord Mohun, 1 P. Wms. 118. See, however, Fish *v.* Cleland, 23 Ill. 238; Cleland *v.* Fish, 43 Id. 282.

[6] Jenkyns *v.* Pye, 12 Pet. 241. See, Hawkins's App., 8 Cas. 263; Bergen *v.* Udall, 31 Barb. 9; In re Martin, 98 N. Y. 193; Millican *v.* Millican, 24 Tex. 426. The rule, however, is more strictly stated in Archer *v.* Hudson, 7 Beav. 551, by Lord Langdale, M. R. (the transaction, however, was not in that case one between parent and child); and see *ante*, p. 293, note 2.

stricter rule.[1] Of course, if there is any evidence of pressure or influence *unduly* exercised, the transaction can never stand.[2]

A leading case on this subject is Taylor *v.* Taylor, where the improper manner in which parental influence may be exercised is strikingly exemplified.[3] Dispositions of property, however, which amount to reasonable and convenient family arrangements, will be upheld as between parent and child.[4] Ordinarily the influence which is to be guarded against is that of the parent over the child; but the case is sometimes reversed, and the natural relation of the parties is changed by time, the parent becoming dependent upon the child. In such cases the rules already stated will apply, and a contract improperly obtained by virtue of such influence will be set aside.[5] The same principles are applicable to cases in which a voluntary gift is obtained by a person who stands in *loco parentis* to the donor.[6]

236. The rule in regard to solicitor and client is more stringent than in either of the two cases already considered.[7] A solicitor *may* purchase from his client, although the bargain will be subjected to the most rigid scrutiny, and the *onus* of showing its fairness lies on the former;[8] but a gift from client to counsel is absolutely void.[9]

Indeed, even in cases of contract, where the property is the subject-matter of the litigation in which the attorney is acting, it is with great difficulty that the purchase can, under any circumstances, be sustained. The utmost good faith (*uberrima*

[1] *Ante*, p. 293. See, also, Baker *v.* Bradley, 7 De G., M. & G. 597; Wright *v.* Vanderplank, 8 Id. 137; Hoghton *v.* Hoghton, 15 Beav. 278; Smith *v.* Smith, 60 Wis. 329; and Miskey's Appeal, 107 Pa. St. 611.

[2] Williams *v.* Williams, 63 Md. 171.

[3] Taylor *v.* Taylor, 8 How. 183; Bergen *v.* Udall, 31 Barb. 9; Miller *v.* Simonds, 72 Mo. 669; and Noble *v.* Moses, 74 Ala. 604.

[4] Jenner *v.* Jenner, 2 Giff. 232; 2 DeG., F. & J. 359; Hartopp *v.* Hartopp, 21 Beav. 259. See Williams *v.* Williams, L. R. 2 Ch. 294.

[5] Highberger *v.* Stiffler, 21 Md. 338; Whelan *v.* Whelan, 3 Cow. 587; Martin *v.* Martin, 1 Heisk. 653; Bowe *v.* Bowe, 42 Mich. 195.

[6] Archer *v.* Hudson, 7 Beav. 551. See, also, as to the effect of family relationships upon such transactions, Kennedy *v.* Kennedy, 2 Ala. 571; Dunn *v.* Chambers, 4 Barb. 376; Seers *v.* Shafer, 2 Seld. 268; Harvey *v.* Mount, 8 Beav. 439.

[7] See Tyrrell *v.* The Bank of London, 10 H. L. Cas. 26.

[8] He must prove the absence of undue influence, or the "*fraus innexa clienti*," as it is termed.

[9] Holman *v.* Loynes, 4 DeG., M. & G. 270; Greenfield's Estate, 2 Harris, (Penna.) 489, 506. See, also, Morgan *v.* Minott, L. R., 6 Ch. Div. 638.

fides) is required on the part of the legal adviser; and the general rule of public policy, which discountenances transactions between persons who are situated in a confidential relation towards each other, applies with particular force to the case of attorneys at law who are officers of the court, and are, on that ground as well as on account of the powerful influence which they exercise over the minds of their clients, restrained from dealing with those whose interests they have in charge.

The question is not whether there was any actual imposition in the particular case. Lord Loughborough, in Newman *v.* Payne, when speaking of Lord Hardwicke's decision on this point, in Walmesley *v.* Booth,[1] says that "it was the case of Japhet Crook, who was *more likely to impose than be imposed on*, yet he *might* be imposed on;" and this is the ground upon which courts of equity have always gone, viz., the fear lest the client "*might* be imposed on."[2]

This rule as to attorneys will apply as long as the relation continues, and even after it had ceased, if the transaction takes place under the still subsisting influence of that relation.[3]

It will not, however, apply when the relation has ceased, and the influence growing out of the same has terminated;[4] and when the attorney has assumed the hostile attitude of a pressing creditor, he may deal with his client as with a stranger.[5]

A client *may* make a gift to his counsel in his will.[6]

237. The relation of trustee and *cestui que trust* is also one of peculiar confidence. The trustee necessarily has ample opportunities for a thorough knowledge of the value, both present and prospective, of the trust estate, of which the *cestui que trust* not having the management of affairs in his hands, must, to a great extent, be ignorant; while at the same time the influence which the former exercises over the mind of the latter is generally very considerable. The general rule, therefore, is, that the trustee cannot take beneficially by purchase, or gift from the

[1] 2 Atk. 25.

[2] Newman *v.* Payne, 2 Ves. Jr. 200. See, also, King *v.* Savery, 5 H. L. Cas. 626; McPherson *v.* Watt, 3 App. Cas. 254; Readdy *v.* Pendergast, 55 L. T. N. S. 768; Merritt *v.* Lambert, 10 Paige, 352; Mahan *v.* Smith, 6 Heisk. 167; Trotter *v.* Smith, 59 Ill. 240; Mott *v.* Harrington, 12 Verm. 199; Miles *v.* Erwin, 1 McCord Ch. 524; Smith *v.* Brotherline, 12 P. F. Sm. 461. See Wendell *v.* Van Rennselaer, 1 Johns. Ch. 344; and see, also, Perry *v.* Dicken, 105 Pa. St. 83—a case which must be considered as exceptional.

[3] Henry *v.* Raiman, 1 Casey, 354.

[4] Wood *v.* Downs, 18 Ves. 127.

[5] Johnson *v.* Fesemeyer, 3 De G. & J. 13.

[6] Hindon *v.* Weatherill, *ante*, p. 294.

cestui que trust. The transaction is ordinarily voidable at the option of the latter.[1]

But the gift or purchase may be deprived of its aspect of presumptive fraud, by the absence of those elements by which fraud is made up. These are, as has just been stated, knowledge on the part of the trustee, ignorance on the part of the *cestui que trust*, and influence unduly used by the former over the mind of the latter. If, therefore, the information which the trustee has is in no way superior to that of the *cestui que trust;* if the latter is fully informed of all the facts of the case, and their probable bearings upon the value of the property; and if he is acting upon independent advice, and his mind is entirely free from any control of the trustee, and the transaction be in itself a reasonable one, it may, under these circumstances, be upheld.[2] The rule under consideration grows out of the general principle explained in a former chapter, that a trustee can make no profit out of the trust estate.[3]

The rule does not apply to the case of a mere dry trustee. The position of such a trustee gives him no vantage ground, either of superior information or of undue influence, over the *cestui que trust*, and the parties, therefore, deal as strangers, and are subject to the ordinary rules of buyer and seller.[4]

The same rules as that which exists between trustee and *cestui que trust*, applies to all persons who occupy a fiduciary, or *quasi* fiduciary relation—such as executors or administrators, directors of a corporation or a society,[5] agents,[6] medical or religious

[1] Coles *v.* Trecothick, 9 Ves. 234; Smith *v.* Townsend, 27 Md. 368; Clarke *v.* Deveaux, 1 S. Car. (N. S.) 184; Diller *v.* Brubaker, 2 P. F. Sm. 498; Wistar's App., 4 Id. 60; Parshall's App., 15 Id. 224; Spencer's App., 30 Id. 332; Griffith *v.* Godey, 113 U. S. 89; notes to Fox *v.* Mackreth, 1 Lead. Cas. Eq. 115; Perry on Trusts, § 195.

[2] See Perry on Trusts, § 195; Hill on Trustees, 158.

[3] See *ante*, page 187.

[4] Parkes *v.* White, 11 Ves. 226.

[5] But a sale of stock by a stockholder to a director is not within the rule applicable to dealings between parties in confidential relations. Carpenter *v.* Danforth, 52 Barb. 581. Nor are directors of a corporation technical trustees. They are mandatories, and are bound to use no more than ordinary skill and diligence. Spering's Appeal, 21 P. F. Sm. 11; Watt's Appeal, 28 Id. 392; Van Weel *v.* Winston, 115 U. S. 228. See, however, the remarks of Bacon, V. C., in Flitcroft's Case, 21 Ch. Div. 525.

[6] See Barrow *v.* Rhinelander, 1 Johns. Ch. 550. When, however, the relation of principal and agent has terminated and a general settlement is made,

advisers,[1] husband and wife[2]—in fine to all those who occupy positions of trust and confidence towards others.[3]

238. Equity not only views gifts and contracts which are made or take place between parties occupying a confidential relation, with a jealous eye, but it goes further, and forbids any person standing in a fiduciary position, from making any profit, in any way, at the expense of the party whose interests he is bound to protect, without the fullest and most complete disclosure. This proposition leads us to an interesting class of cases, of which the leading one may be said to be Tyrrell *v.* The Bank of London, in the House of Lords.[4] In that case, there was in existence a project to start a new bank in London, and among the projectors of the scheme was the appellant, a member of the bar, whose firm, it had been agreed, were to be employed as the solicitors of the company. The appellant, hearing that a certain lot of ground was for sale, suitable for the purposes of the bank, entered into an arrangement with a party who controlled the option to buy from the owners, whereby the appellant became interested in the option. He then induced his co-projectors to purchase a portion of the property at an advance, he (of course) making a certain profit by the transaction. After the arrangement was discovered, a bill was filed by the company for the purpose of obtaining relief; and it was held that the appellant was accountable to the company for the profit which he had made. This case is instructive as showing the exact measure of relief which a court of equity affords in such cases, and the grounds upon which that relief rests. The company (it was held) had not a mere right to rescind the bargain into which they had entered; nor, on the other hand, was the appellant held to be a trustee of any property other than that which he had actually bought and conveyed to the company. The decision, therefore,

actual fraud must be proved in order to disturb it. Courtright *v.* Barnes, 2 McCrary, 532. See, also, Mitchell *v.* Homfray, 8 Q. B. Div. 587.

[1] Ahearne *v.* Hogan, 1 Drury, 310; Greenfield's Est., 12 Harris, 232; Huguenin *v.* Baseley, 14 Ves. 273. As to the validity of gifts from nuns to their convents, see Whyte *v.* Meade, 2 Ir. Eq. R. 420; McCarthy *v.* McCarthy, 9 Id. 620; s. c. *nomine* Fulham *v.* McCarthy, 1 H. L. Cas. 703; see, also, In re Metcalf's Trusts, 2 De G., J. & Sm. 122; Article in 10 Jur. N. S. 91. Note to Huguenin *v.* Baseley, 2 Lead. Cas. Eq. 581 (4th Eng. ed.).

[2] Darlington's Appeal, 5 Norris, 512.

[3] See Hill on Trustees, 547 (4th Am. ed.); Ford *v.* Olden, L. R., 3 Eq. 461.

[4] 10 H. L. Cas. 26.

was that the company were not obliged to repudiate the tran action altogether, but were entitled to take the lot, which ha been conveyed to them, at the price which it had cost Tyrrell in other words, that as to that particular property Tyrrell coul make no gain at the company's expense.[1] But it was furthe held that the appellant's liability to account stopped with tha particular lot, and did not extend to other property which ha been included in the purchase from the original owner.[2]

239. This rule is thoroughly established both in England an in the United States.[3] The difficulty is in its application; fo it is equally well established that there is no principle of equit which prohibits a man from buying a piece of property, an afterwards saying to those who subsequently unite with him i getting up a company: "I begin the transaction here—I hav purchased land, no matter how, or from whom, or at wha price—I will sell the land at so much."[4] The test seems to b whether at the time of the acquisition of the property by th defendant, he was then acting in any way on the company behalf. If he was, he can make no profit at the company's ex pense by a purchase and resale.[5]

The redress which is afforded to the *cestui que trust* in cases o fraud by trustees or other fiduciaries is either rescission or ac

[1] See Bagnall *v.* Carlton, 6 Ch. Div. 385. See, however, McMillan *v.* Arthur, 98 N. Y. 167.

[2] See the argument of Sir Roundell Palmer, afterwards Lord Chancellor Selbourne, and the manner in which that argument was answered by the court, 10 H. L. Cas., pp. 31, 45.

[3] See Hitchins *v.* Congreve, 4 Russ. 574; Beck *v.* Kantorowicz, 3 K. & J. 230; New Sombrero Phosphate Co. *v.* Erlanger, L. R., 5 Ch. D. 73; affd. in 3 App. Cas. 1218; McAleer *v.* McMurray, 8 P. F. Sm. 126; Simons *v.* The Vulcan Oil Co., 11 Id. 202; McElhenny's Appeal, Id. 192 (opinion of Sharswood, J.); Short *v.* Stevenson, 13 P. F. Sm. 95; Rice's Appeal, 29 Id. 204; Bailey *v.* Coal Co., 19 Id. 340; Great Luxembourg Ry. Co. *v.* Magnay, 25 Beav. 586; Collins *v.* Case, 23 Wis. 230; Lindley on Partnership, 481. Se article in 16 Am. Law Rev. 671-69 Also Guest *v.* Smythe, L. R., 5 Ch. 55 and the remarks upon this case in th note to Fox *v.* Mackreth, 1 Lead. Ca Eq. 161 (4th Eng. ed.).

[4] See Foss *v.* Harbottle, 2 Hare, 489 Kent *v.* Freehold Land & Brickmakin Co., L. R., 4 Eq. 588; Densmore Densmore, 14 P. F. S. 49; McElhenn *v.* Hubert Oil Co., 11 Id. 188; an Grover's Case L. R., 1 Ch. D. 182.

[5] In the absence of actual fraud th mere fact that the defendant was promoter does not, under the lates English cases, seem to justify an other relief than rescission: Erlange *v.* New Sombrero Phosphate Co., App. Cas. 1236 and 1242; In re Cap Breton Co., 29 Ch. D. 803.

count according to the circumstances of the case. If the trustee has *resold* the estate he can be made to account for what he has received over and above the purchase-money he has himself paid; and, in England, he is chargeable with interest at the rate of 4*l.* per cent.[1] The rule in this country as to the trustee's liability to account, is the same.[2] If the property has not been sold by the trustee, and the *cestui que trust* wishes to have it back again, he is entitled to a decree for a reconveyance. This decree will be made upon the terms of the *cestui que trust* repaying the purchase-money with interest, and whatever has been expended by way of permanent improvement to the estate, with an allowance for acts which have deteriorated its value and an account of the rents and profits.[3] If the *cestui que trust* does not wish for a reconveyance, or if the case is one in which a trustee for sale (as an assignee in bankruptcy, for example), has himself been the purchaser, the course is that the expense of repairs and improvements shall be added to the purchase-money (after making an allowance for deterioration), and that the estate shall be put up at the accumulated sum; if any one makes an advance upon that sum the trustee shall not have the estate; if no one does he will be held to his purchase.[4] If an agent to purchase attempts to make an illegal profit, the principal has a right to take the estate at what it cost the agent.[5]

The question has sometimes arisen whether, when property has been obtained by violation of fiduciary relations or some other fraud, the remedy of the injured party is simply rescission or account, or whether he is entitled to compel the wrongdoer to pay the true value of the article. Instances of this point sometimes occur when directors of a corporation take shares of stock at less than par, and the question then is, whether the directors can be made to pay par. In England the rule is, that

[1] Fox *v.* Mackreth, 2 Cox, 320; Hall *v.* Hallet, 1 Id. 134; Ex parte Reynolds, 5 Ves. 707.

[2] Lazarus's Lessee *v.* Bryson, 3 Binney, 54, 58; Jackson *v.* Walsh, 14 Johns. 407, 415; Hawley *v.* Cramer, 4 Cow. 719; Robbins *v.* Bates, 4 Cush. 104; Hoffman *v.* The Cumberland Coal Co., 16 Maryl. 456.

[3] Popham *v.* Exham, 10 Ir. Ch. Rep. 440; notes to Fox *v.* Mackreath, 1 Lead Cas. Eq. 235, 257 (4th Am. ed.).

[4] Ex parte Hughes, 6 Ves. 624; Ex parte Lacey, Id. 630; Ex parte Bennett, 10 Ves. 400; Am. note to Fox *v.* Mackreath, 1 Lead. Cas. Eq. 257 (4th Am. ed.).

[5] Bank of London *v.* Tyrrell (*supra*).

the director can only be compelled to return the stock, or, if he has sold at a profit, to account for that profit.[1] But a different view has been taken by the Supreme Court of the United States.[2]

It was remarked in a former part of this treatise, that trustees could not, without leave of the court, buy at their own sales.[3] The same remark is applicable to all parties whose duty requires them to sell for the benefit of another. They cannot sell to themselves. It is repugnant to common honesty and justice that the same party should be both vendor and purchaser. If he attempts so to act, it is a fraud.[4]

Before leaving this subject it may be observed that benefits obtained by undue influence cannot be held by third parties although they may be innocent of the fraud. When a gift is made under such circumstances, "let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it."[5] Of course where the property comes into the hands of a *bonâ fide* purchaser for value and without notice of the fraud, the rule is different.

[1] See Currie's Case, 3 De G., J. & Sm. 367; Carling's Case, L. R., 1 Ch. Div. 115; De Ruvigne's Case, 5 Id. 306; Anderson's Case, 7 Id. 94. See, also, Foreman *v.* Bigelow, 18 N. B. Reg. 457. See, also, Pearson's Case, L. R., 5 Ch. Div. 336.

[2] Hawley *v.* Upton, 102 U. S. 314. See, also, Upton *v.* Tribilcock, 91 U. S. 45; Chupp *v.* Upton, 95 Id. 666; Pullman *v.* Upton, 96 Id. 328; Hatch *v.* Dana, 101 Id. 205. See, also, Flinn *v.* Bagley, 7 Federal Reporter, 785, where the cases are reviewed.

[3] *Ante*, pp. 136, 137, 187. See, also, Frank's Appeal, 9 P. F. Sm. 195; Campbell *v.* McLain, 1 Id. 200; Ogden *v.* Larrabee, 57 Ill. 389; Colgate *v.* Colgate, 8 C. E. Green, 362.

[4] See Norris *v.* Tayloe, 49 Ill. 18; Greenwood *v.* Spring, 54 Barb. 375; North Baltimore Building Association *v.* Caldwell, 25 Maryl. 423; Carter *v.* Thompson, 41 Alab. 375; Harris *v.* Parker, Id. 604.

[5] Per Chief Justice Wilmot in Bridgeman *v.* Green, Wilm. 58, 64; s. c. 2 Ves. 627.

SECTION IV.

FRAUD AFFECTING THIRD PARTIES; GENERAL RULES AS TO FRAUD.

240. Subdivisions of frauds of this class; fraud upon creditors.
241. Statute 13 Elizabeth, c. 5.
242. Jurisdiction of equity in cases under the statute.
243. Conveyance must be for a good consideration, and *bona fide*.
244. Moral obligations; consideration of marriage.
245. Voluntary transfers; conveyances by persons indebted.
246. Conveyances of property which could not be reached by execution.
247. Gifts from husband to wife.
248. Parties by whom fraudulent conveyances may be avoided.
249. Secret agreements touching composition deeds.
250. Fraud upon subsequent purchasers; Statute 27 Eliz., c. 4.
251. Difference between the English and American rules.
252. Statute not applicable to personal chattels.
253. Fraud on marital rights; *Strathmore* v. *Bowes*.
254. Ignorance of the husband as to the existence of property immaterial.
255. Circumstances which constitute fraud on marital rights.
256. Fraud on powers; *Aleyn* v. *Belchier*.
257. Appointment must be made solely to carry out the purpose of the power; *Topham* v. *The Duke of Portland*.
258. Admissibility of parol evidence to vary or contradict written instruments in cases of fraud; *Woolham* v. *Hearn*; *Gillespie* v. *Moon*.
259. How the right to impeach a fraudulent transaction may be lost; confirmation; release, acquiescence.
260. Delay; *bona fide* purchasers for value.

240. The last class of frauds embraces those which do not operate to deceive either of the immediate parties to the transaction, but which affect injuriously the interests of third persons.

Frauds of this class may be divided, as respects the injured parties, into (1) Frauds upon creditors; (2) Frauds upon purchasers; (3) Frauds upon marital rights; and (4) Frauds upon powers.

The first of these subdivisions of fraud arises in this way:—

An almost universal incident to property when possessed absolutely by persons *sui juris*, is the power of alienation. Subject to some few restrictions—such as those imposed (in

England) by the statutes of mortmain, and the like—a man may sell, exchange, or give away his lands and goods when and to whom he pleases.

If, however, a man is in the position of a debtor, this absolute right of alienation is qualified and restrained by the principle that the power of disposition is not to be exercised for the purpose of defrauding his creditors, or defeating their lawful right to subject his estate to the satisfaction of their claims. Hence, almost all systems of jurisprudence discountenance alienations which are fraudulent as to creditors, and provide means whereby this species of wrong may be redressed.

241. Conveyances in fraud of creditors were, it seems, voidable at common law.[1] However, whether it was that this was originally considered a doubtful question, or whether the frequency and variety of these fraudulent alienations were so great, that it was deemed proper to affirm the common law by positive legislation; certain it is, that from very early times, statutes were passed for the purpose of protecting the rights of creditors against such covinous practices.

Thus, as early as the reign of Edward III., a statute was passed which recited that divers persons had given their tenements and chattels to their friends by collusion, and had afterwards fled to the franchise at Westminster or other privileged places, and had lived "a great time with a high countenance of another man's goods," and then went on to enact that if it were found that the said gifts were actually made by collusion the said creditors should have execution of the said tenements and chattels as if no such gifts had been made.[2]

The most celebrated of these statutes is that of 13 Eliz., c. 5.[3]

This act, after reciting that "feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions have been contrived of malice, fraud, covin, collusion, etc., to delay, hinder or defraud creditors or others of their just and lawful

[1] See notes to Twyne's Case, 1 Sm. Lead. Cas. 33; Cadogan *v.* Kennett, 2 Cowp. 432; Clements *v.* Moore, 6 Wall. 299, 312; Clark *v.* Douglass, 12 P. F. Sm. 408.

[2] 50 Edw. 3, v. 6; note to Twyne's Case, 1 Sm. Lead. Cas. 33. See, also, Stats. of 3 Hen. VII., c. 4; 2 R. II. c. 3; Heath *v.* Page, 13 P. F. Sm. 121.

[3] The statute of 27 Eliz., c. 4, was (as is well known) passed to protect the rights of subsequent *purchasers*. See *post*, § 250.

actions, suits, debts, accounts, damages," etc., proceeds to enact that every feoffment, etc., of land, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution, made for any intent and purpose before declared and expressed, shall be, as against that person, his heirs, successors, executors, etc., whose actions, suits, etc., are or might be in any wise disturbed, hindered, delayed or defrauded, utterly void.[1]

242. Equity has concurrent jurisdiction with law over frauds under these statutes; and the same rules of construction are adopted in both courts.[2] Where property, which is legally liable to be taken in execution has been fraudulently conveyed or encumbered, the jurisdiction is concurrent, as the creditor may either issue an execution at law, or file a bill in equity to have the conveyance set aside.[3] Where, however, the property is such that it was never subject to execution at law, the only remedy is in chancery.[4]

243. Two general questions arise, under the statute of Elizabeth; first, *what* conveyances are voidable; and second, as against *whom* are they voidable.

And, in the first place, it is the fraudulent *intent* which invalidates the conveyance. A transfer may be made for a valuable consideration—nay, the consideration may be a full and ade-

[1] This statute has been substantially re-enacted and its provisions adopted in most of the United States; 2 Kent's Com. 440.

[2] Note to Sexton *v.* Wheaton, 1 Am. Lead. Cas. 58, 59; Hopkirk *v.* Randolph, 2 Brock. 133.

[3] 1 Am. Lead. Cas. 49. See Swift *v.* Arents, 4 Cal. 390; Blenkinsopp *v.* Blenkinsopp, 1 De G., M. & G. 500; Sheafe *v.* Sheafe, 40 N. Hamp. 516; Lillard *v.* McGee, 4 Bibb. 166; Scott *v.* The Indianapolis Wagon Works, 68 Ind. 75; Cook *v.* Johnson, 1 Beasley, (N. J.) 51; Hendricks *v.* Robinson, 2 Johns. Ch. 283; Athey *v.* Knotts, 6 B. Monroe, 24, where a court of equity afforded relief by following the money which had been expended by an insolvent in improvements upon the property of another. See, also, Barto's Appeal, 5 P. F. Sm. 386.

[4] Botsford *v.* Beers, 11 Conn. 370; Weed *v.* Pierce, 9 Cow. 722; 1 Am. Lead. Cas. 59; *post*, Part III., Ch. VI. A court of equity has jurisdiction to set aside a transfer from husband to wife on the ground of fraud on creditors—the remedy at law not being adequate. Skilton *v.* Tiffin, 6 How. 163; Massey *v.* Allen, 7 N. B. R. 401; Spackelford *v.* Collin, 6 Bush, 149; Pratt *v.* Carter, 6 N. B. R. 139; Lee *v.* Hollister, 5 Fed. Rep. 756.

quate one; but yet if it is effected with a fraudulent *intent* it will, nevertheless, be void.[1]

This fraudulent intent may be either express[2] or implied, and the implication of fraud may arise in various ways, as (for instance) by the creditor showing that the grantor was indebted to the extent of insolvency, or even that he was largely indebted at the time of making the conveyance.[3]

The most usual evidence of a fraudulent intent is found in the absence of consideration. Hence it has been laid down as a rule that a voluntary alienation of property is, in general, void as against creditors.[4] This rule corresponds with the proviso in the statute of Elizabeth. The statute declares that all conveyances made with an intent to hinder, delay, and defraud creditors, shall be void as against the parties intended to be injured. It then goes on, in a subsequent section, to provide that this rule shall not apply to *bona fide* transfers for a good consideration. Two requisites, therefore, are necessary to the validity of a transfer; first, it must be made in good faith; and, secondly, it must be for good consideration.[5] The consideration will not avail if *bona fides* be wanting. The good faith will not save the conveyance if it be made without consideration. The term *good* consideration has been construed to mean a valuable consideration. A *good* consideration, in one sense of the term, embraces not only those which are founded on value, but those also which are founded on the duties, and obligations, and feelings of relationship, and are therefore termed *meritorious*, as

[1] Twyne's Case, 3 Co. Rep. 212; 1 Sm. Lead. Cas. 33; Holmes *v.* Penny, 3 K. & J. 99; Chandler *v.* Von Roeder, 24 How. 224; Zerbe *v.* Miller, 4 Harris, (Pa.) 497; Gragg *v.* Martin, 12 Allen, 498; Root *v.* Reynolds, 32 Verm. 139, Pulliam *v.* Newberry, 41 Alab. 168; Florence Sewing Machine Co. *v.* Ziegler, 58 Id. 221; Rogers *v.* Evans, 3 Ind. 574; Poague *v.* Boyce, 6 J. J. Marsh. 70; Trotter *v.* Watson, 6 Humph. 509; Mosely *v.* Gainer, 10 Tex. 393; Haymaker's Appeal, 3 P. F. Sm. 306; Bump on Fraud. Convey. 197; Kerr on Fraud and Mistake (Bump's ed.) 200.

[2] Spirett *v.* Willows, 3 De G., J. & Sm. 293.

[3] Taylor *v.* Jones, 2 Atk. 600; Crossley *v.* Elworthy, L. R., 12 Eq. 158; Cornish *v.* Clark, 14 Id. 184. See, also, Freeman *v.* Pope, L. R., 5 Ch. 538; Smith *v.* Cherrill, L. R., 4 Eq. 390, 396; note to Ellison *v.* Ellison, 1 Lead. Cas. Eq. 284 (4th Eng. ed.).

[4] See notes to Sexton *v.* Wheaton, 1 Am. Lead. Cas. 37; 2 Kent's Com. 441.

[5] Clements *v.* Moore, 6 Wal. 312.

contradistinguished from valuable. A good consideration, however, as used in the statute, means one founded on value. A transfer to a wife or child, however meritorious it may be, is not valid as against creditors.[1]

244. The consideration, however, although it must be valuable, need not be founded on a *present legal obligation.* It is enough if there is a present *moral* obligation, founded on an antecedent legal obligation. Thus, if A. be indebted to B., but the indebtedness is barred by the statute of limitations, it is not obligatory upon A. to plead the statute. He may, if he sees fit, pay the debt, or transfer property in satisfaction thereof, and the payment or transfer will be good as against his creditors. Upon the same principle a man may pay a debt from which he has been released by the operation of the bankrupt law, and the property so applied cannot be followed by creditors.[2]

A transfer in consideration of marriage, is a transfer for a valuable consideration; and if a settlement is made after marriage, in pursuance of an antenuptial agreement, it will be upheld if the agreement is valid and binding.[3] But a settlement made in pursuance of an ante-nuptial *parol* agreement, will not, by reason of the statute of frauds, be valid.[4]

245. A transfer of property which is purely voluntary may, under certain circumstances, be sustained. Any one may make a gift, the value of which bears but an insignificant proportion to his estate. If his remaining property is ample to discharge his debts, the transaction cannot be impeached.[5]

A difference of opinion, however, has existed upon this point, and the question becomes much more complicated if debts are subsequently contracted by the voluntary grantor. The true rule seems to be that the gift will be valid if the "donor has, at the time, the pecuniary ability to withdraw the amount of the donation from his estate without the least hazard to his

[1] Bump on Fraudulent Conveyances, 248.

[2] Id. 249, 250.

[3] Kirk *v.* Clark, Prec. in Ch. 275; Snell's Eq. 68. See Reade *v.* Livingston, 3 Johns. Ch. 489. Whether it is necessary that some particular marriage should be in contemplation, see Sterry *v.* Arden, 1 Johns. Ch. 261.

[4] Warden *v.* Jones, 2 De G. & J. 76; Hill on Trustees, 89 (4th Am. ed.) and notes.

[5] Hopkirk *v.* Randolph, 2 Brock. 132; 2 Kent. Com. 441, notes.

creditors, or in any material degree lessening their prospects for payment."[1]

But a fraudulent intent will vitiate a settlement, and may be *implied* from many circumstances. Thus, if the settlor is largely indebted at the time of making the settlement,[2] or insolvent, or unable to pay his debts after making the voluntary settlement,[3] or puts everything into the settlement and thus renders himself insolvent,[4] the settlement cannot stand.[5]

A voluntary conveyance will be good as against *subsequent* creditors, unless it is made with the fraudulent intent of defeating their claims. Whether such a fraudulent intent does or does not exist is a question of fact, which is to be determined by evidence. The mere circumstance that the alienation is voluntary is not, of itself, a sufficient indication of fraud.[6] The donor must not, however, be insolvent; or be about to embark in a hazardous business.[7] Nor would the mere fact that the settlor retains enough to pay his existing debts, and actually pays them, be sufficient to render the settlement valid, if the settlement were really made with the intent to evade the statute.[8]

246. It was decided in England that a voluntary transfer of property, which could not be reached by execution, was not

[1] See Jenkyn *v.* Vaughan, 3 Drewy, 425; Kent *v.* Riley, L. R., 14 Eq. 190; Snell's Eq. 64; Bump on Fraud. Convey. 291.

[2] Thompson *v.* Webster, 4 Drewy, 628; 4 De G. & Jo. 600; 7 Jur. N. S. (House of Lords) 531.

[3] Freeman *v.* Pope, L. R., 5 Ch. 538, 541.

[4] Smith *v.* Cherrill, L. R., 4 Eq. 390, 396.

[5] Notes to Ellison *v.* Ellison, 1 Lead. Cas. Eq. 285.

[6] Sexton *v.* Wheaton, 8 Wheat. 229; Mattingly *v.* Nye, 8 Wal. 370; Townsend *v.* Westacott, 2 Beav. 340; Salmon *v.* Bennett, 1 Conn. 525; Jackson *v.* Town, 4 Cowen, 599; 4 Kent Com. 442; 1 Am. Lead. Cas. 37, 40. A voluntary conveyance is not void as to future creditors unless there is some evidence to indicate that the grantor intended to withdraw his property from such creditors. Snyder *v.* Christ, 3 Wright, 499; Harlan *v.* Maglaughlin, 9 Norris, 297.

[7] To render the conveyance fraudulent the grantor must actually enter into the hazardous business; for if it is merely an intention not carried out, the conveyance cannot be considered void. Williams *v.* Davis, 19 P. F. Sm. 21.

[8] Holmes *v.* Penney, 3 K. & J. 90; 1 Am. Lead. Cas. 40. See, also, Thomson *v.* Dougherty, 12 S. & R. 448; Snyder *v.* Christ, 3 Wright, 506; Ammon's Appeal, 13 P. F. Sm. 284, Monroe *v.* Smith, 29 Id. 459; Lillard *v.* McGee, 4 Bibb, 166.

fraudulent as against creditors; and although the decisions upon this point have been conflicting, the doctrine must be considered in England to be well established.[1] Nevertheless, it was there held that while *choses in action* did not fall under the statute of Elizabeth, and therefore creditors could not be said to be prejudiced by their assignment, inasmuch as they were not liable to execution, yet in cases falling under the Insolvent Debtors' Acts the rule was different, because under these acts all the debtor's property become applicable to the payment of his debts.[2] And *choses in action*, since 1 and 2 Vic., c. 100, have become available for the payment of debts, and are therefore within the statute.[3] In the United States the tendency is to consider the language of the statute as comprehending all kinds of personal property, including *choses in action*;[4] and, moreover, there are, in many States, legislative enactments whereby *choses in action* may be reached by execution.[5]

The English doctrine, therefore, can scarcely be said to exist throughout the United States. Besides, in many of the States, property of an equitable character, and property conveyed in fraud of creditors, may be reached by a *creditors' bill;* a remedy which may be considered as having originated in the case of Spader *v.* Davis,[6] in the year 1821, and which has been very extensively employed since that time. These bills will be noticed in their proper place under the head of Equitable Remedies.[7]

247. The extent to which a man has the power to make a voluntary disposition of his property, is frequently called into question in the cases of settlements made by a husband upon his wife. There are many decisions to the effect that a gift from a husband to a wife, to be sustained even as against *subsequent* creditors, must be *reasonable*, that is, it must bear a just and fair proportion to the actual amount of his property, and to his condition and prospects in life.[8] A man cannot denude himself of

[1] Story's Eq. Jurisp., § 361; 2 Kent Com. 442.

[2] See Norcutt *v.* Dodd, 1 Cr. & Ph. 100.

[3] Stokoe *v.* Cowan, 29 Beav. 637.

[4] Elliott's Ex'rs.' Appeal, 14 Wright, 82; Bayard *v.* Hoffman, 4 Johns. Ch. 450.

[5] See 4 Kent Com. 443.

[6] 2 Johns. Ch. 280. See 4 Kent Com. 443.

[7] See *post*, Part III., Chapter VI.

[8] Notes to Sexton *v.* Wheaton, 1 Am. Lead. Cas. 57. See, also, Spirett *v.* Willows, 34 L. J. Ch. 365; Wickes *v.* Clark, 8 Paige, 151; Benedict *v.* Mont-

all or a greater part of his means for the purpose of making a gift to his wife. To allow him to do so would be to open a wide door to fraud, for, by putting his property in his wife's name, he might practically secure the means of support for himself, and at the same time obtain for his property a complete immunity from his liabilities. What the amount of this reasonable provision should be, seems to be a matter of some little doubt. It may be possible that the doctrine itself as to the reasonableness of the provision, would apply only to those cases in which a common-law conveyance between husband and wife is attempted to be used, and not where a gift is made through a deed operating under the statute of uses. A gift directly from a husband to a wife is void at law. It is sustained in equity, through the medium of a trust—a chancellor regarding the conveyance as a declaration of trust, and treating the husband as a trustee. But a court of equity will only lend its assistance to a married woman, under such circumstances, when the transaction operates as a *reasonable* provision for her; and the aid of the chancellor, being a matter of grace, will not be extended for the purpose of giving *all* a man's property to his wife, to the detriment of his creditors. But a conveyance to a wife through the medium of a third party—as if A. and his wife convey to B., who then re-conveys to A.'s wife—is good at law, and needs no equitable interposition to support it. It would seem, therefore, that, apart from actual fraud, such a method of settling property upon the wife ought to stand upon the same footing as gifts to a stranger.

248. It must be remembered that conveyances in fraud of creditors are void only as against those who may be injured thereby.[1] The statute avoids conveyances made to defraud

gomery, 7 W. & S. 238; Coates *v.* Gerlach, 8 Wright, 43; Mullen *v.* Wilson, Id. 413; Ammon's Appeal, 13 P. F. Sm. 284; Mellon *v.* Mulvey, 8 C. E. Green, 198; Thompson *v.* Thompson, 1 Norris, 378; Stickney *v.* Borman, 2 Barr, 67; Penna. Salt Manf. Co. *v.* Neel, 4 P. F. Sm. 9; Morris *v.* Ziegler, 21 Id. 450.

[1] Notes to Sexton *v.* Wheaton, 1 Am. Lead. Cas. 45. See, particularly, Chapin *v.* Pease, 10 Conn. 69; Burtch *v.* Elliott, 3 Indiana, 99; Bouslough *v.* Bouslough, 18 P. F. Sm. 495. See, also, as to the further proposition that proceedings to avoid a fraudulent transfer will enure to the benefit only of those who institute them, not to the advantage of other creditors, Fowler's Appeal, 6 Norris, 455–456; Shulze's Appeal, 1 Barr, 251; Tomb's Appeal, 9 Id. 61.

"creditors and *others*,' and it was, therefore, said in Twyne's case, that "the act doth not extend only to *creditors*, but to all who had cause of action, suit, penalty, forfeiture, etc." Hence it has been held that a person entitled to a penalty under the Usury Acts, was within the class of persons who were designed to be protected by the statute of Elizabeth.[1] But the term "others" does not include every one. The conveyance may be perfectly good as against the party executing it, and as against every other person consenting or privy to it.[2] The fraudulent grantor himself cannot elect to set the conveyance aside, nor enforce a secret trust for his own benefit. His lips are closed. This, indeed, is in obedience to the general principle that where the parties to a fraudulent contract have fully executed it themselves, courts of justice will not interfere to unravel their doings; but, considering them *in pari delicto*, will leave them bound as they found them. And the application of this principle to the case of conveyances in fraud of creditors is unquestionable.[3] The principle, indeed, is one of common law, which makes that which is fraudulent in fact void; but whose maxim in all cases of confederate fraud, is "*in pari delicto melior est conditio defendentis.*"[4] Nor will equity interfere on behalf of a volunteer, claiming under the grantor.[5]

In England it was decided that if a debtor made a fraudulent conveyance of his land, and then died, the only persons who had a standing in court to set the conveyance aside were lien credit-

[1] Heath *v.* Paige, 13 P. F. Sm. 108 (see this case also for a general discussion of the effect of the statute); Shontz *v.* Brown, 3 Casey, 131.

[2] Robinson *v.* McDonnell, 2 B. & A. 134; Steel *v.* Brown, 1 Taunt. 381; Bessy *v.* Windham, 5 Q. B. 166.

[3] Blystone *v.* Blystone, 1 P. F. Sm. 374; Bonesteel *v.* Sullivan, 104 Pa. St. 9.

[4] But a party may sometimes be able to call an associate in an illegal transaction to account for the profits which have been made. Brooks *v.* Martin, 2 Wall. 78; Sharp *v.* Taylor, 2 Phillips Ch. 801 (*ante*, p. 61); McBlair *v.* Gibbes, 17 How. 232; Tenant *v.* Elliot, 1 Bos. & P. 3; Farmer *v.* Russell, Id. 296; Thomson *v.* Thomson, 7 Vesey, 473. In those cases, also, in which the debtor has been induced by the threats or improper influence of the grantee to execute the fraudulent conveyance, he *may* come into equity to have it set aside, for in such a case he is not in *pari delicto*. See Cook *v.* Colyer's Adm'r., 2 B. Mon. 72; Deatley's Adm'r. *v.* Murphy, 3 A. K. Marsh. 474.

[5] See Dolphin *v.* Aylward, L. R., 4 H. L. Cas. 486. An assignee for the benefit of creditors is not a purchaser for value. Spackman *v.* Ott, 15 P. F. Sm. 135.

ors. Ordinary bond or simple contract creditors, whose claims had not been reduced to judgment, could not attack the transaction. But in America fraudulent dispositions of property by a debtor during his lifetime can be impeached after his death by any of his creditors. This is on the ground that property of all kinds in this country is deemed assets for the payment of debts.[1]

249. Another class of cases of fraud upon creditors, is where secret advantages are obtained by some creditors, at the expense of others, who are induced to sign composition deeds, of which the supposed basis is equality. Such secret agreements are manifestly fraudulent, and cannot stand the test of the investigation of a court of chancery;[2] or, in modern times, of a court of law.[3]

250. Akin to the subject of fraud which affects creditors, is that of fraud against subsequent purchasers. The statute of 27 Eliz., c. 4, made perpetual by statute 39 Eliz., c. 18, § 31, enacts that every conveyance, grant, charge, lease, limitation of use, of, in or out of any lands, tenements or other hereditaments whatsoever, for the intent and purpose to defraud and deceive such persons as shall purchase the said lands, shall be deemed, only against such persons who shall so purchase for money or any good consideration the said lands, to be wholly void, frustrate and of none effect.[4]

Even before the act purchasers were not without remedy in such cases in a court of equity; but the statute has rendered their rights precise, and their remedy more extended.[5]

251. There is an important difference between the English and American construction of this statute. In England, it is held that a voluntary conveyance is void as against a subsequent purchaser, even although he may have notice of the same—the theory being that as the voluntary conveyance is rendered void

[1] Story's Eq. Jurisp., §§ 375, 376.

[2] Jackman *v.* Mitchell, 13 Ves. 581; Wood *v.* Barker, L. R., 1 Eq. 139; Smith *v.* Stone, 4 G. & J. 310; Doughty *v.* Savage, 28 Conn. 146; Case *v.* Gerrish, 15 Pick. 49; Lawrence *v.* Clark, 36 N. York, 158; Loucheim Brothers' Appeal, 17 P. F. Sm. 49; Patterson *v.* Boehm, 4 Barr, 507; Mann *v.* Darlington, 3 Harris, 310; Kerr on Fraud and Mistake, 215 (Bump's ed.).

[3] Id. 215.

[4] See notes to Ellison *v.* Ellison, 1 Lead. Cas. Eq. 283 (4th Eng. ed.).

[5] Kerr on Fraud and Mistake, 227; Perry Herrick *v.* Attwood, 2 De G. & J. 21. See Davis *v.* Bigler, 12 P. F. Sm. 247.

by the statute, no subsequent purchaser is bound to regard it.[1] In the United States, however, the rule is different; and a purchaser who has notice of a prior voluntary grant will take subject to the rights of the voluntary grantee.[2] But the rule upon this subject is not uniform throughout the United States.[3]

It is essential to the operation of the statute that both conveyances should be made by the same person. An heir or devisee cannot, by a conveyance for value, defeat a voluntary settlement made by his ancestor or testator; and if the voluntary grantee has conveyed for value, his alienee can hold as against a subsequent purchaser from the original grantor.[4]

A mortgagee is a purchaser within the statute.[5] It need hardly be added, that as between the parties to the transaction the voluntary conveyance will be good.[6]

252. The statute of 27 Elizabeth, c. 4, does not apply to personal chattels; but as it is in affirmance of the common law, it would seem that its principles ought to be applied, with the modifications rendered necessary by the difference in the subject matters, to the transfers of personal property.[7] The possession of chattels generally follows the title; indeed, a change of possession is, in general, necessary in order to render the sale valid as against the creditors of the vendor;[8] while delivery is essential to a valid gift. A man, therefore, can rarely be deceived as to the rights of the donee of a chattel; while he may very well be misled as to the rights of a voluntary alienee of real estate. Hence, the donee of personal property, ought not, generally, to be

[1] Doe *v.* James, 16 East, 212; Buckle *v.* Mitchell, 18 Vesey, 111. See, also, Cathcart *v.* Robinson, 5 Peters, 265, 279; Hill *v.* The Bishop of Exeter, 2 Taunt. 69; notes to Sexton *v.* Wheaton, 1 Am. Lead. Cas. 50, 51; notes to Ellison *v.* Ellison, 1 Lead. Cas. Eq. 283 (4th Eng. ed.). But this rule is not regarded with satisfaction in England; and, therefore, any consideration, no matter how small or inadequate, will be sufficient to support the first settlement. Bayspoole *v.* Collins, L. R., 6 Ch. 228, 232.

[2] Lancaster *v.* Dolan, 1 Rawle, 231; Dougherty *v.* Jack, 5 Watts, 456; Mayor *v.* Williams, 6 Maryl. 242; 1 Am. Lead. Cas. 51.

[3] See Sterry *v.* Arden, 1 Johns. Ch. 261; and 1 Am. Lead. Cas. 51.

[4] Kerr on Fraud and Mistake, 229.

[5] Lancaster *v.* Dolan, 1 Rawle, 231; Lewis *v.* Love's Heirs, 2 B. Mon. 345; Ledyard *v.* Butler, 9 Paige, 132; Clapp *v.* Leatherbee, 18 Pick. 131.

[6] See *ante*, p. 61.

[7] Hudnal *v.* Wilder, 4 McCord, 294; though see Jones *v.* Croucher, 1 Sim. & S. 315; Bohn *v.* Headley, 7 Harris & Johns. 257; Sewell *v.* Glidden, 1 Judges (Alab.), 52, 61; 1 Am. Lead. Cas 53

[8] Twyne's Case, 1 Sm. Lead. Cas. 33.

disturbed in his possession by a subsequent purchaser, because it is the latter's own folly to buy that of which another has the possession. When, however, the donee or even the vendee of chattels suffers them to remain in the possession of the former owner, and the latter sells them again to a *bona fide* purchaser without notice, the title of such purchaser cannot be impeached.[1]

253. The next species of fraud upon third parties, which demands attention, is that which is known as fraud upon marital rights, whereby the expectation by a man of an interest in the property of his intended wife is defeated.

The leading authority upon this subject is Strathmore v. Bowes,[2] in which the opinion of Lord Thurlow contains a clear statement of the general doctrine, while the decision itself establishes an important qualification.

The doctrine in question may be stated to be that if a woman during the course of a treaty of marriage, makes a voluntary[3] conveyance of any part of her property, without notice to her intended husband, such conveyance will be treated, in equity,[4] as fraudulent and void as against him, and will be set aside by a chancellor on the husband's application.[5]

The plainest case of fraud of this kind is, of course, that in which active deception takes place. If, during the treaty for marriage, a woman expressly holds herself out to her intended husband as entitled to property which will become hers upon marriage, and then makes a settlement without his knowledge, she is guilty of actual fraud, and the settlement cannot stand.[6]

[1] See notes to Lickbarrow *v.* Mason, 1 Smith's Lead. Cas. 1147.

[2] 1 Lead. Cas. Eq. 405. See, also, Wilson *v.* Daniel, 13 B. Mon. 351; Cheshire *v.* Payne, 16 Id. 618; Duncan's Appeal, 7 Wright, (Pa.) 67; Robinson *v.* Buck, 21 P. F. Sm. 392; Freeman *v.* Hartman, 45 Ill. 57; Perry on Trusts, § 213.

[3] The rule will not apply to a conveyance for value. See Blanchet *v.* Foster, 2 Ves. Sr. 264.

[4] The conveyance cannot be treated as void at law. Logan *v.* Simmons, 1 Dev. & Bat. (Law) 13, 16; Doe *v.* Lewis, 11 C. B. 1035. At all events it is not necessarily fraudulent. Doe *v.* Lewis, *supra*.

[5] See Chambers *v.* Crabbe, 34 Beav. 457; Terry *v.* Hopkins, 1 Hill Ch. 1; Waller *v.* Armistead's Adm'rs., 2 Leigh, 11; Manes *v.* Durant, 2 Rich. Eq. 404; McAfee *v.* Ferguson, 9 B. Mon. 475; Williams *v.* Carle, 2 Stockt. Ch. 543; Duncan's Appeal, 7 Wright, (Pa.) 67; Linker *v.* Smith, 4 Wash. C. C. 224; Tucker *v.* Andrews, 13 Maine, 124.

[6] See England *v.* Downs, 2 Beav. 528; Logan *v.* Simmons, 3 Ired. Eq. 487. See also Kline *v.* Kline, 7 P. F. Sm. 120.

It is clear also, that the same rule exists if there is a suppression of the truth, and merely a concealment of the settlement, although there may be no active representations that the property is to be subject to marital rights.[1]

254. A question, however, naturally arises here, upon which there has been some slight difference of opinion. Suppose the intended husband is entirely ignorant that the woman is possessed of property, and therefore marries her without any expectation that he will acquire any estate by her. In such a case he cannot be said to be disappointed if it turns out that there has been an antenuptial settlement, and can he, therefore, under these circumstances be heard to complain? This question, however, is now settled in favor of the husband. It is true that he is not deprived of anything which he expected to get, and no anticipations of his are therefore defeated; but nevertheless, he is deprived of his legal rights, and placed in a position in respect to his wife and her property, which he ought not to occupy, except with his full knowledge and consent.[2]

But the rule under consideration does not apply to property of the wife to which the marital rights would not have attached; as where, for example, the woman has a life estate to her separate use, to the exclusion of any future husband, with an absolute power of appointment by deed or will, and exercises the power before marriage, by the execution of a settlement on herself.[3]

255. It was said above that a disposition of her property by a woman about to marry will be sustained if made for a valuable consideration. The consideration, however, must be *valuable;* for the true rule seems to be (although the law is not, perhaps, free from doubt), that a settlement made upon a meritorious consideration—*e. g.*, for the benefit of the children of a former marriage—will not be good as against the husband.[4]

The settlement to be fraudulent must be in view of a particu-

[1] England *v.* Downs, 2 Beav. 528. See, however, Thomas *v.* Williams, Mos. 177; De Manneville *v.* Crompton, 1 V. & B. 354, where silence, under the circumstances, was held to be no fraud.

[2] Goddard *v.* Snow, 1 Russ. 485; Taylor *v* Pugh, 1 Hare, 608; Logan *v.* Simmons, 3 Ired. Eq. 487. Though see St. George *v.* Wake, 1 My. & K. 622. See, also, Downes *v.* Jennings, 32 Beav. 290; Prideaux *v.* Lonsdale, 1 De G., J. & Sm. 433.

[3] Cole *v.* O'Neill, 3 Maryl. Ch. 174.

[4] Blanchet *v.* Foster, 2 Vesey, Sr., 264. Though see Green *v.* Goodall, 1 Cold. 404.

lar marriage, and it will be so only in respect of the intended husband, who was in treaty of marriage at the time of the settlement.[1]

A settlement by a woman will not be set aside if the intended husband has notice of it at any time—no matter how short the interval may be—before the marriage.[2] Nor does the circumstance that the husband is a minor at the time of the marriage make any difference. He will, if he consents to the arrangement, or has knowledge of it, be precluded from disputing it after he attains his majority.[3]

If the husband, after the marriage, acquiesces in and confirms the settlement, he cannot afterwards be heard to dispute it.[4]

A man may, by his conduct before marriage, deprive himself of his right to impeach a settlement made without his knowledge. Thus, where a woman was seduced by her intended husband before marriage, and afterwards made a disposition of the property of which he had no notice, it was, nevertheless, held that under the circumstances he was not entitled to have the settlement set aside.[5]

The rule which forbids a disposition of property by a woman, in contemplation of marriage, to the injury of the rights of her intended husband, has also been applied to the case of a man conveying his property away in fraud of an intended wife.[6]

256. Another class of frauds upon third parties, comprises those cases in which there is a fraudulent exercise of a power.

A power, in the sense it is here used, is an authority enabling a person, through the medium of the statute of uses, to dispose of an interest vested in himself or some third person. Thus, land may be conveyed to A. in trust for such uses as B. should appoint; or in trust for such person or persons generally as B. should appoint; or in trust for such members of a particular class—as children, grandchildren, or the like—as B. should

[1] Strathmore *v.* Bowes, *ante.*

[2] Terry *v.* Hopkins, 1 Hill Ch. 1, 5; Cheshire *v.* Payne, 16 B. Mon. 618; St. George *v.* Wake, 1 My. & K. 610.

[3] Slocombe *v.* Glubb, 2 Bro. C. C. 545.

[4] England *v.* Downs, 2 Beav. 528; 1 Lead. Cas. Eq. 421. But see Logan *v.* Simmons, 3 Ired. Eq. 487; Manes *v.* Durant, 2 Rich. Eq. 404.

[5] Taylor *v.* Pugh, 1 Hare, 608.

[6] Smith *v.* Smith, 2 Halst. Ch. 515; Petty *v.* Petty, 4 B. Mon. 215. See also Kline *v.* Kline, 7 P. F. Sm. 120; Campbell's Appeal, 30 Id. 309; and Baird *v.* Stearne, 15 Phil. 339.

appoint. This right of appointment in B. is called a power. The person who creates the power is the *donor;* the person by whom it is to be exercised is called the *donee of the power*, or, when he actually exercises it, the *appointor;* the person in whose favor the appointment is made is the *appointee;* and those for whose benefit the power was intended to be executed are termed the *objects* of the power.

Powers of this kind are of very frequent occurrence in English marriage settlements, being the ordinary machinery whereby marriage portions are raised, and the distribution of funds among children or other beneficiaries regulated.

It is a cardinal principle in the law of powers that "a person having a power must execute it *bona fide* for the end designed, otherwise it is corrupt and void." This was the language of Lord Keeper Henley in Aleyn *v.* Belchier, which is the leading authority upon this subject.[1] If a power is not exercised in good faith, and for the purposes for which it was created its exercise will be deemed fraudulent in equity, and will be set aside upon a bill filed by a party in interest.

A case in which a power is thus improperly exercised, is said to be a case of "a fraud upon the power."

The plainest case of a fraud upon a power, is where the power is exercised for the personal advantage of the appointor. If a father has a power to appoint among children, and agrees with one of them, for a sum of money, to appoint to him, such appointment would be void. Aleyn *v.* Belchier, and Lane *v.* Page,[2] are instances in which powers to raise marriage portions have been improperly exercised for the purpose of paying the debts of the appointor, and the appointment has, in consequence, been set aside. The same rule applies to appointments made with a view to obtain the fund appointed through undue influence over the appointee,[3] or with an expectation of the appointee's death and succession to his estate;[4] or to any case in which the motive of the appointor is to acquire any benefit for himself either directly or indirectly.[5]

[1] 1 Lead. Cas. Eq. (4th Eng. ed.), 377.

[2] Ambler, 233.

[3] Marsden's Trust, 4 Drew. 601.

[4] Wellesley *v.* Mornington, 2 K. & J. 143.

[5] Duke of Portland *v.* Topham, 11 H. L. Cas. 32.

Again, the appointment will be considered fraudulent and invalid, if it is exercised for the benefit of a stranger, and not for the advantage of the objects of the power; and this will be so although the appointee may be unaware of the fraudulent design of the appointor.[1]

257. A power will, also, be deemed to be improperly exercised if it is used for any purposes other than those for which it was created. The appointment must be made with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object—sinister in the sense of its being beyond the purpose and intent of the power. There must be a pure, straightforward, honest dedication of the property, as property, to the person to whom the appointor affects or attempts to give it.[2]

The circumstance that the donor of the power may acquiesce in, or even favor the fraudulent exercise of the power, will not render such exercise valid, if the appointment is one calculated to defeat the purposes for which the power was created. The fraud for which a court of equity sets such an appointment aside, is not a fraud upon the donor, but a *fraud upon the power*. If the purpose of the *power* is defeated, the consent of the donor cannot make the appointment good. Lee *v.* Fernie[3] and the Duke of Portland's case are illustrations of this doctrine. In the first case, an appointment for the benefit of a stranger was deemed invalid, although made in pursuance of an arrangement with the donor of the power. In the latter, the invalid appointment was made in pursuance of the expressed wish (agreed to by his children) of the late Duke of Portland (the testator); and yet the appointment was held bad, because made, not with the view of carrying out the purpose of the power, but with the

[1] Marsden's Trust, 4 Drew. 601. But an appointment will not be set aside if the bargain did not induce the appointment. See Cooper *v.* Cooper, L. R., 5 Ch. 212. Children may contract with *each other*, to give the parent who is the appointer some advantage. Davis *v.* Uphill, 1 Swanst. 130. See Roach *v.* Trood, L. R., 3 Ch. D. 429, which was distinguished from Marsden's Trust, and Topham *v.* Duke of Portland (*supra*); and also Henty *v.* Wrey, 21 Ch. D. 332, where the appointment was held *not* to be a fraud because there was nothing upon which to base any "judicial inference" that a fraud on the power was intended.

[2] Topham *v.* Duke of Portland, 31 Beav. 525; 1 De G., J. & Sm. 517; 11 H. L. Cas. 32; L. R., 5 Ch. 40. See, also, Salmon *v.* Gibbs, 3 De G. & Sm. 343.

[3] 1 Beav. 483.

view of discountenancing a marriage of the Duke's sister with Colonel Topham.

If, however, the donee of a discretionary power acts with *bona fides* and with his own good judgment, and with an honest intention of carrying out the purpose of the power, the mere circumstance that he has given a promise to the donor to exercise the power in a certain way, will not disqualify him. And evidence is admissible to show that the donee acted on his own judgment, and that *that* judgment coincided with his promise.[1]

An appointment bad in part will generally be invalid *in toto*. But a good appointment in favor of one child, will not be invalidated by a fraudulent appointment to another, if the two can be separated.[2]

258. Having examined the different heads of fraud, it will be proper, before leaving the general subject, to notice briefly one or two rules which have been laid down by courts of chancery for the purpose of effectually securing the relief to which the injured party is entitled.

It is one of the rules of evidence at common law that parol testimony shall not be admitted for the purpose of varying, adding to, or taking away from the language of a written instrument; the reason for the rule being the obvious one that where an agreement has been reduced to writing by the act and consent of the parties, its terms should be sought for in the instrument which has been selected as the repository and evidence of the purpose of the contracting parties, and not on one side of it, in extrinsic facts or allegations.[3] It will also be remembered that the statute of frauds requires that the creation and transfer of certain estates in land shall be manifested and proved in writing; and that contracts of a certain kind shall not be enforced unless there exists some written memorandum of the same, signed by the party who is sought to be charged therewith. Now, it is manifest, that, if the common-law rule of evidence above stated and the provisions of the statute of frauds were rigidly adhered to, without any exceptions whatever, great injustice would in

[1] Williams's Appeal, 23 P. F. Sm. 249.

[2] Rowley *v.* Rowley, Kay, 242.

[3] American note to Woollam *v.* Hearn, 2 Lead. Cas. Eq. 670.

many instances ensue, and that these legal rules would become simply the refuge and hiding places of fraud.

It is, therefore, established in equity that no rule of law shall be used for the purpose of protecting fraud; and that while in general the rules of evidence are the same in equity as at law,[1] yet in cases of accident, mistake and fraud, parol evidence is admissible for the purpose of making out the complainant's case, although the effect of the admission may be to alter, or add to, a written instrument, or to affect the title to real estate. This equitable rule arises from the necessity of the case, and in order that the jurisdiction of courts of chancery in such cases (particularly those of fraud) may be effectively asserted; for, as was said by Lord Thurlow, "the moment you impeach a deed for fraud, you must either deny the effect of fraud on a deed, or you cannot but be under the necessity of admitting parol evidence to prove it."[2] This doctrine has been followed by very many cases both in England and in the United States; although the decisions throughout the Union, upon the application of the doctrine, have not been altogether harmonious. In some States, as in New York[3] and Pennsylvania,[4] the tendency has been to give very great latitude to the admission of parol evidence; in others, such as Massachusetts, the inclination of the courts has been the other way.[5] The application of this doctrine is seen in

[1] Manning *v.* Lechmere, 1 Atk. 453.

[2] Shelburne *v.* Inchiquin, 1 Bro. C. C. 338; Hill on Trustees, 166.

[3] Gillespie *v.* Moon, 2 Johns. Ch. 585; Keisselbrack *v.* Livingston, 4 Id. 144.

[4] Thomson's Lessee *v.* White, 1 Dallas, 447; Christ *v.* Diffenbach, 1 S. & R. 464; Iddings *v.* Iddings, 7 Id. 111; Miller *v.* Henderson, 10 Id. 290; Clark *v.* Partridge, 2 Barr, 13; Rearich *v.* Swinehart, 1 Jones, 233; Martin *v.* Berens, 17 P. F. Sm. 463; Beegle *v.* Wentz, 5 Id. 369; Cook *v.* Cook, 19 Id. 443; Wolford *v.* Herrington, 24 Id. 311; Lippincott *v.* Whitman, 2 Norris, 244.

[5] Locke *v.* Whiting, 10 Pick. 279; Glass *v.* Hulbert, 102 Mass. 24. This subject will be found discussed at length in the American note to Woollam *v.* Hearn, 2 Lead. Cas. Eq. 670. See, also, Hill on Trustees, 166; 1 Sug. V. and P. 243, (8th Am. ed.) note by Perkins; and particularly Wharton on Evidence, § 1019, *et seq.*, where the authorities are collected. Among the numerous authorities cited by Dr. Wharton, the following may be particularly referred to; Rhodes *v.* Farmer, 17 How. 467; Brown *v.* Holyoke, 53 Me. 9; Buel *v.* Miller, 4 N. Hamp. 196; Cutler *v.* Smith, 43 Verm. 577; Russell *v.* Bomy, 115 Mass. 300; Diman *v.* R. R., 5 R. I. 130; Blakeman *v.* Blakeman, 39 Conn. 320; Pitcher *v.* Henessey, 48 N. Y. 415; Wheeler *v.* Kirtland, 23 N. J. Eq. 13; Huss *v.* Morris, 13 P. F. Sm. 367; Wharton *v*

those cases in which absolute deeds may be shown to be mortgages; in which specific performance is sought to be resisted or enforced; in which the reformation of written instruments is decreed; as well as in cases of fraud, accident or mistake.[1]

It need scarcely be added that when parol evidence has been admitted for the purpose of raising a presumption of fraud, it is equally admissible on behalf of the defendant for the purpose of rebutting that presumption.

259. The right to impeach a transaction on the ground of fraud may be lost by confirmation, by release, by acquiescence, or by delay; and such a right has no place as against a *bona fide* purchaser for a valuable consideration, without notice.[2]

In reference to confirmation and release, it need only be said that when such defences are relied on, it must clearly appear that the party confirming was fully apprised of his right to impeach the transaction; and that he acted freely, deliberately and advisedly, with the intention of confirming a transaction which he knew, or might, or ought, with reasonable or proper diligence, to have known to be impeachable.[3]

A transaction, originally voidable on the ground of fraud, may become unassailable in consequence of the acquiescence of the injured party in the state of affairs which has resulted from the fraudulent act. A man who has a right to avoid a contract cannot take the chance of its turning out advantageously to himself, and then, abiding the event, and finding that it has turned out to his disadvantage, elect to avoid it.[4] When a party desires to rescind on the ground of fraud or mistake, he must, upon the discovery of the facts, at once announce his intention, and adhere to it. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. And this rule is peculiarly applicable to specu-

Douglass, 26 Id. 273; Kearney *v.* Sascer, 37 Md. 264; Fleming *v.* McHale, 47 Ill. 282; Moore *v.* Munn, 69 Id. 591; Cain *v.* Hunt, 41 Ind. 466; Beers *v.* Beers, 22 Mich. 42; Van Dusen *v.* Parley, 40 Ia. 70; Lake *v.* Meacham, 13 Wis. 355; Guernsey *v.* Ins. Co., 17 Minn. 104; Exchange Bank *v.* Russell, 50 Mo. 531; Murray *v.* Dake, 46 Cal. 654. See, also, Rowand *v.* Finney, 96 Pa. St. 192.

[1] See *ante*, Part I., Chap. VII.; *post*, Part III., Chaps. I. and III.

[2] Kerr on Fraud and Mistake, Chap. I., Sec. VI.

[3] Kerr on Fraud and Mistake, 296.

[4] Ormes *v.* Beadel, 2 De G., F. & J. 333. See Bank of Macon *v.* Bartlett, 71 Ga. 798.

lative property which is liable to large and constant fluctuations in value.[1] But an acquiescence which is the result of ignorance of material facts goes for nothing. The party must have knowledge of the facts, in order that acquiescence may be brought home to him.[2]

260. A person who is injured by fraud must be prompt in seeking redress. Laches and neglect are always discountenanced. Nothing can call a court of chancery into activity but conscience, good faith and reasonable diligence, and where these are wanting, the court is passive and does nothing.[3] A court of equity does not encourage stale claims, and a party may lose his right to complain of a fraud by his delay.[4] There is, perhaps, no certain rule as to the length of time which will bar the right to relief in cases of fraud. What is a reasonable time must depend upon the discretion of the court, the exercise of which will be regulated by the circumstances of the particular case.[5] Thus, in Michoud *v.* Girod,[6] it was said that a court of equity would not refuse relief within the lifetime of either of the parties upon whom the fraud is proved, or within *thirty* years after it becomes known to the party whose rights are affected by it; and in Gresley *v.* Mousley[7] a transaction between solicitor and client was set aside two years after the death of the former, and eighteen years after that of the latter. On the other hand, cases have occurred in which the utmost promptness has been required.[8] Of these, instances may be found in those cases in which shareholders of companies have sought to repudiate their allotments and recover their money on the ground of misrepresentation, and in which the greatest vigilance and diligence have been exacted.[9]

[1] Grymes *v.* Sanders, 3 Otto, 62; Thomas *v.* Bartow, 48 N. Y. 200; Lloyd *v.* Brewster, 4 Paige, 537; Saratoga, &c., Rd. Co. *v.* Rowe, 24 Wend. 74; Diman *v.* Providence, &c., Rd. Co., 5 R. I. 130.

[2] Kerr on Fr. and Mis., 298, 300.

[3] Smith *v.* Clay, Ambl. 645; Sullivan *v.* Portland & Kennebec Rd. Co., 4 Otto, 806; Brown *v.* County of Buena Vista, 5 Id. 160; Wills *v.* Wood, 28 Ken. 400.

[4] See *ante*, p. 59, Maxim III. See, also, Rath *v.* Vanderlyn, 44 Mich. 597.

[5] Ryder *v.* Emrick, 104 Ill. 470; Kerr on Fr. and Mis., 305.

[6] 4 How. 561; Coddington *v.* Pensacola & Georgia Rd., 103 U. S. 409; Johnson *v.* Somerville, 33 N. J. Eq. 152, 621.

[7] 4 De G. & J. 78.

[8] Hunt *v.* Blanton, 89 Ind. 38.

[9] See Heyman *v.* European Central

In many cases courts of equity have taken the statutes of limitation as standards, by which to measure the time properly allowable for the assertion of an equitable right. But this is by analogy only; and chancery tribunals will not hesitate to apply their own doctrines, as to delay, whenever the circumstances of the case require it.[1]

It was stated above,[2] that the right to set aside a transaction on the ground of fraud, has no place as against a *bona fide* purchaser for a valuable consideration without notice. This is due, however, rather to the existence of certain distinct equities, which all, perhaps, grow out of fraud, but which seem to require a separate consideration. These are the equities of notice and of a *bona fide* purchaser for value; and they will be attempted to be explained in the succeeding chapter.

Railway Co., L. R., 7 Eq. 154; Denton *v.* MacNeil, 2 Id. 352; Taite's Case, 3 Id. 795; Whitehouse's Case, Id. 794. See, also, Reese River Mining Co. *v.* Smith, L. R., 4 H. L. Cas. 64; Ayerst *v.* Jenkins, L. R., 16 Eq. 275; Ashhurst's Appeal, 10 P. F. Sm. 290; Evans's Appeal, 31 Id. 278; Watts's Appeal, 28 Id. 371.

[1] See Allore *v.* Jewell, 4 Otto, 512; Smith *v.* Clay, Ambler, 645; Wilson *v.* Anthony, 19 Arkansas, 16; Taylor *v.* Adams, 14 Id. 62; Johnson *v.* Johnson, 5 Ala. 90; Ferson *v.* Sanger, 2 Ware, 256; Fisher *v.* Boody, 1 Curtis, 219; Cholmondeley *v.* Clinton, 2 Jac. & W. 141; Sullivan *v.* Portland Rd. Co., 4 Otto, 811; Buckingham *v.* Ludlow, 37 N. J. Eq. 138; Bell *v.* Moon, 79 Va. 341; Kerr on Fraud and Mistake, 304; Hill on Trustees, 168. See, however, Gibbons *v.* Hoag, 98 Ill. 45.

[2] *Supra*, § 259.

CHAPTER III.

NOTICE.

261. Doctrine of notice not applicable to contests between purely legal titles.
262. Applicable to equitable titles; *Le Neve* v. *Le Neve*.
263. Illustrations of the doctrine.
264. Parties by whom want of notice may be set up. Rules on this subject.
265. Extent of protection afforded by want of notice.
266. English rule that payment of purchase-money and acquisition of legal title must both precede notice.
267. Rule in United States; protection *pro tanto*.
268. Notice actual and constructive; actual notice either direct or presumptive.
269. Constructive notice; Vice-Chancellor Wigram's division.
270. Notice by registration.
271. What registration will operate as notice.
272. Effect of actual notice of unregistered conveyance.
273. Constructive notice of same.
274. Lis Pendens.
275. Plea of *bona fide* purchaser for value.
276. Can be used by the holder of an equitable title.
277. Doctrine of seeing to the application of purchase-money.
278. Abolished in England.
279. Of little importance in the United States.

261. In a conflict between purely legal titles, the circumstance that one of the parties, at the time he acquired his rights, had any knowledge of the existence of the adverse claim, is a fact which is entirely immaterial, and is regarded as of no consequence whatever in determining the judgment of the court.

If A. buys a legal title to an estate, it is a matter of no moment that, at the time of his purchase, he was aware that a different legal title to the same property was vested in B.[1]

Each party stands or falls on his strict right. If A.'s title is superior, his knowledge of B.'s title cannot interfere with his

[1] Except in cases where the rule is altered by statutes in regard to recording conveyances, under which it has been held, in some States, that the notice of a prior unregistered conveyance will postpone a second grantee who has recorded his deed. See Troy City Bank *v.* Wilcox, 24 Wis. 671; *post*, § 272.

recovery; if inferior, his ignorance of B.'s better title is no protection.[1]

Thus, in a contest between a party who rests upon a paper title, and one who claims simply by virtue of adverse possession, each party bases his right of recovery, not upon an *equitable*, but upon a *legal* title, and it can make no possible difference that he who claims by virtue of an adverse possession had notice of the legal paper title; but on the contrary, his notice thereof would be an element to show that the adverse possession was hostile in its character, and, therefore, capable, if continued for a sufficient time, of ripening into an unassailable title.

Another illustration of the doctrine may be found in the rule which exists in England and in some of the United States upon the subject of voluntary conveyances. According to that rule a subsequent grantee is entitled to avoid a prior voluntary conveyance, although he had notice of the same at or before the date of the conveyance to himself. Notice, under this view of the law, cannot vary the question, for it is only notice of a conveyance which was void against a subsequent purchaser for a valuable consideration;[2] in other words it is only notice of a defeasible legal title.[3]

262. Where, however, equitable titles and rights are concerned, the rule is different. A man who acquires, even for valuable consideration, a legal title with the knowledge that it is affected by an equity, takes it subject to that equity; *a fortiori*

[1] See the remarks of Mr. Justice Davis in Gaines *v.* New Orleans, 6 Wallace, 716; and also Ruckman *v.* Decker, 8 C. E. Green, 283; and the American note to Basset *v.* Nosworthy, 2 Lead. Cas. Eq. (4th Am. ed.) 46.

[2] Per Lord Ellenborough in Doe *v.* James, 16 East, 212; note to Sexton *v.* Wheaton, 1 Am. Lead. Cas. 46.

[3] It will be remembered that in some of the United States, as in Pennsylvania (for example), a subsequent purchaser for value cannot avoid a prior grant if he has notice of the same. But the ground upon which the courts in some of the States have thus refused to follow the English rule is that the legal title acquired by the second purchaser is bad, because the second sale is a fraud on the part of the vendor, and if the second vendee has notice of the first conveyance, the purchase itself is an act of collusion. See Lancaster *v.* Dolan, 1 Rawle, 246. See, also, the remarks of C. J. Kent at the close of his opinion in Jackson *v.* Burgot, 10 Johns. 462; and the decision in Worseley *v.* De Mattos, 1 Burr. 474, where the endorsee of a bill of lading was nonsuited *in an action at law*, because he had notice of a prior, but defective, transfer of the bill, which had been followed by delivery of the goods.

is his acquisition so subject, if it is the purchase of a new *equitable* title. On the other hand, a purchaser may often defend himself against the assertion of an equitable right, on the ground that when he paid his money he did not know that any such right existed.

The principle in these cases has been well stated by a learned writer to be that an interest which, if legal, would be indefeasible, shall not be defeated by reason of its equitable character, by a party who has notice of it. If being legal it may be defeated at law, there is no equity to preserve it.[1]

In the leading case of Le Neve *v.* Le Neve[2] this doctrine is stated by Lord Chancellor Hardwicke in the following language: "A person who purchases an estate (although for valuable consideration), after notice of a prior equitable right, makes himself a *mala fide* purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest."

"Fraud or *mala fides*," said the same learned judge, "is the true ground on which the court is governed in cases of notice."[3] The subject of Notice may, therefore, with propriety be discussed immediately after that of Fraud; although, from its importance, it seems proper to treat it as a distinct head of equity jurisprudence.

263. In considering this subject, it may, in the first place, be desirable to define, as nearly as may be, what Notice is.

Notice, then, in its technical sense, is the legal cognisance of a fact. It differs from knowledge, for knowledge may exist without notice, and there may be notice without any actual knowledge. Thus a court, in the consideration of a cause, may be bound to take judicial notice of facts of which no actual proof whatever exists; and on the other hand, a judge or a jury may be compelled to disregard known facts, because although proved to exist, they cannot be judicially recognised in the determination of the particular issue. So, also, there may be no technical *notice* of a right or title, although knowledge of the right or title may exist;[4] and, again, there may be notice of

[1] Adams's Equity, 152.

[2] 3 Atk. 646; 2 Lead. Cas. Eq. 35.

[3] See Kettlewell *v.* Watson, 21 Ch. D. 705.

[4] As, for example, where a deed is defectively acknowledged and the record is relied upon as notice. See *infra*, § 271.

another's right although there is no knowledge whatever that any such right is claimed.[1]

Notice, therefore, in the sense here used, may be said to be the definite legal cognisance, either actual or presumptive, of a right or title; and the doctrine of Notice in Equity may be described to be this, viz., that where such cognisance is shown to exist, either by proof as a fact or by presumption of law, the right or title, thus proved to be known, will be capable of assertion in equity as against a party who might otherwise and at law have disregarded it.

It is obvious that the cases in which this doctrine arises are numerous.

If a man holds a legal title to an estate, but his conscience is affected with a *trust* in favor of another, he may sell the estate, and the purchaser, if he buys *bona fide* and for value, and has no notice of the trust, will take it discharged of the same, and the remedy of the *cestui que trust* will be against the trustee alone.[2]

But if the purchaser has notice of the trust, he will be bound in the same way as the original trustee; in other words, he will be construed to hold the legal title as a trustee for the equitable owner.[3]

The same rule will be enforced for the protection of prior equitable vendees—(*i. e.*, vendees under agreements not consummated by a conveyance of the legal title)—holders of an equitable or of a defective mortgage—vendors who have parted with the legal title, but who still may have an equitable lien for unpaid purchase-money; purchasers under an unregistered conveyance,[4] and parties for whose benefit covenants have been entered into which affect the land, although they may not technically run with the land.[5]

Moreover, where a party has control of the legal title to property, he cannot be compelled to make or permit a transfer of it

[1] As, for instance, the notice of a title under a recorded conveyance.

[2] Basset *v.* Nosworthy, 2 Lead. Cas. Eq. 1; Perry on Trusts, § 218.

[3] Coble *v.* Nonemaker, 28 P. F. Sm. 506; Day *v.* Cohn, 65 Cal. 508; Hill on Trustees, 164 (359, 4th Am. ed.), and notes; Perry on Trusts, § 217.

[4] Notes to Le Neve *v.* Le Neve, 2 Lead. Cas. Eq. 35.

[5] Tulk *v.* Moxhay, 2 Phill. 774; Wilson *v.* Hart, L. R., 1 Ch. 463; Western *v.* McDermott, L. R., 2 Ch. 72. See, also, Keates *v.* Lyon, 4 Id. 218.

by one in whom it is vested in disregard of the interests of the equitable owners. The equitable title of such owners must be taken notice of.[1]

On the other hand, want of notice will operate to protect one who buys from a trustee, or a subsequent vendee, or mortgagee who gets in the legal title, or a purchaser under a duly registered conveyance.

264. It is important to determine, with some precision, *by whom* the defence of want of notice may be set up, and this is more particularly so as there was at one time a seeming conflict of authority upon the question whether such a defence can be taken advantage of by the holder of an equitable, as well as of a legal, title. The better opinion now seems to be that the apparently conflicting decisions upon this point may be reconciled under the views which have been expressed in the recent cases, and especially in Phillips *v.* Phillips,[2] where the subject was clearly explained. The rules which are now recognised are, in substance, these:—

First. The holder of a legal title may always set up the want

[1] Thus in Lowry *v.* The Commercial and Farmers' Bank of Baltimore, decided by Chief Justice Taney in the Circuit Court of the United States for the Maryland District, it was ruled that where bank stock had been bequeathed to an executor in trust to pay the dividends to certain persons, and the executor had transferred it to one who made advances thereon for the use of the executor, the bank which had issued the certificate, having notice that the stock belonged originally to the testator, was bound to look at the title of the executor under the will before it permitted the transfer. In this case the transfer was made by the executor as such, and there was no proof that there was any actual notice to the bank that the stock had been specifically bequeathed, and that the executor was violating his trust by making the transfer. Yet it was held that the bank was bound to take notice of the will when the transfer was proposed by one of the executors; that it was negligence in the bank not to examine it, and that if it was ignorant of its contents, and of the specific bequest of the stock, it was its own fault; that it must be dealt with as if it had possessed actual knowledge that the stock in question was specifically bequeathed by the testator, and was not, by the will, to be transferred. Lowry *v.* The Commercial and Farmers' Bank of Baltimore, 3 Am. L. J. N. S. 111; Bayard *v.* The Farmers' and Mechanics' Bank, 2 P. F. Sm. 232. See Albert *v.* The City of Baltimore, 2 Maryl. 159; Stockdale *v.* The South Sea Company, Barnardiston's R. 363; Harrison *v.* Harrison, 2 Atk. 121; Davis *v.* Bank of England, 2 Bingham, 393; Albert *v.* Savings Bank, 1 Md. Ch. Dec. 407.

[2] 4 De G., F. & J. 208. See the remarks on this case in Cave *v.* Cave, 15 Ch. D. 646.

of notice of an equity as a defence to its assertion; and as against him a court of chancery will grant no relief. When the legal title is obtained at the time of the purchase nothing can be clearer than that the purchaser without notice is entitled to priority in equity as well as at law, according to the maxim that where equities are equal the law will prevail.[1] It is also equally well settled, that where the purchaser without notice does not acquire the legal title at the time of his purchase, but subsequently gets it, he is entitled to avail himself of it as a defence to an equity, provided he does not, by that act, become a party to a breach of trust;[2] because, as the equities of both parties are equal, there is no reason why the purchaser should be deprived of the advantage he may obtain at law by superior activity and diligence.[3] This is the common doctrine of the *tabula in naufragio*.[4] The same rule is likewise applied not only to cases in which the subsequent purchaser actually gets in the legal title, but also to those in which he has a superior right to call for it. Thus, where there are two encumbrances on an estate of which the legal title is outstanding in a third party, and the holder of the outstanding legal title declares himself a trustee for the second encumbrance, such a declaration (unless circumstances occurred to alter the rule) would operate to give the second priority over the first.[5]

Second. The holder of an equitable title may avail himself of want of notice as a defence, and he may do this even when the plaintiff is the holder of the legal title. For example, in Basset *v.* Nosworthy,[6] which is a leading authority upon the subject,

[1] *Ante*, p. 59. See Pilcher *v.* Rawlings. L. R., 7 Ch. 259; Snell's Eq. 20.

[2] Saunders *v.* Dehew, 2 Vern. 271.

[3] Snell's Eq. 20.

[4] Phillips *v.* Phillips, 4 De G., F. & J. 218. See, also, Fitzsimmons *v.* Ogden, 7 Cranch, 2, 18; Zollman *v.* Moore, 21 Grat. 313; Campbell *v.* Brackenridge, 8 Blackf. 471; Gibler *v.* Trimble, 14 Ohio, 423; Osborn *v.* Carr, 12 Conn. 195, 208; Carroll *v.* Johnston, 2 Jon. Eq. 120; Baggarly *v.* Gaither, Id. 80; Leach *v.* Ansbacher, 5 P. F. Sm. 85; Carlisle *v.* Jumper, 81 Ky. 282.

[5] Wilmot *v.* Pike, 5 Hare, 14; Snell's Equity, 21; Ex parte Knott, 11 Ves. 609.

[6] 2 Lead. Cas. Eq. 1. This doctrine is recognised in Bellas *v.* McCarty, 10 Watts, 13, and Rhines *v.* Baird, 5 Wright, 265, where the ruling in Chew *v.* Barnet, 11 Serg. & Rawle, 389, Reed *v.* Dickey, 2 Watts, 459, and Kramer *v.* Arthurs, 7 Barr, 165, was disapproved. A similar conclusion was reached in Union Canal Co. *v.* Young, 1 Whart. 431. See, also, Wood *v.* Mann, 2 Sumn. 316. In other cases, however, a different rule has been laid down.

an heir-at-law claiming under the legal title filed a bill against a purchaser from a devisee to compel discovery of a revocation of the will. The defendant pleaded a purchase for value without notice and the plea was allowed. The same principle was recognised by Lord Eldon in Wallwyn *v.* Lee,[1] and by Lord St. Leonards in Joyce *v.* De Moleyns,[2] and must now be considered as well established in equity jurisprudence in England.[3]

But to this doctrine there is one exception, viz., that where the bill is filed simply to enforce a legal right through an equitable remedy, a plea of purchase for value will be overruled. This distinction was established in the case of Williams *v.* Lambe,[4] where a widow filed a bill against a purchaser from her husband, claiming dower. The defendant pleaded a purchase without notice of the vendor being married; but the plea was overruled by Lord Thurlow. This case and that of Collins *v.* Archer[5] were supposed to be at variance with the decisions in Wallwyn *v.* Lee and Joyce *v.* De Moleyns, referred to above; but it was subsequently pointed out in Phillips *v.* Phillips[6] that Lord Thurlow's ruling was not, when properly considered, a contradiction of the rule that the holder of an equitable title may set up the want of notice as a defence, but that the rule itself was never applicable to cases in which courts of chancery afford legal relief concurrently with courts of law. The same doctrine had indeed been explained by the Master of the Rolls, Sir John Romilly, in Finch *v.* Shaw,[7] where the distinction was said to be this: If the suit be for the enforcement of a legal claim, then, although the court may have jurisdiction, it will not interfere as against a purchaser for value without notice, but will leave the parties to law; if, on the other hand, the legal title is perfectly clear, and attached to that legal title there is an equitable remedy which can only be enforced in chancery, there is no case in which the court will refuse to

See Snelgrove *v.* Snelgrove, 4 Dess. 274; Jones *v.* Zollicoffer, 2 Taylor, 214; Blake *v.* Heyward, 1 Bailey's Eq. 208; Larrowe *v.* Beam, 10 Ohio, 448. See, also, Boone *v.* Chiles, 10 Pet. 177; Sumner *v.* Waugh, 56 Ill. 531.

[1] 9 Ves. 24.

2 J. & L. 374.

[3] Phillips *v.* Phillips, 4 De G., F. & J. 218.

[4] 3 Bro. C. C. 264.

[5] 1 Russ. & My. 284.

[6] 4 De G., F. & J. 208.

[7] 19 Beav. 500; affirmed in 5 H. L. Cas. 905, *nom.* Collyer *v.* Finch.

enforce the equitable remedy which is incidental to the legal title. The bill for discovery in Basset *v.* Nosworthy and the bill for dower in Williams *v.* Lambe are illustrations of these two classes of cases. In the former the plea of purchase for value was good as against the discovery, the jurisdiction of the court being auxiliary; in the latter it was not good as against the relief, the jurisdiction being concurrent.[1]

Third. Where the legal estate is neither in the plaintiff nor defendant, and neither has a right to call it in, but it is outstanding in a third party, encumbrancers will take in order of time, and the defence of a purchase for value cannot be made.[2] But the equities must be equal, otherwise the rule *qui prior est tempore potior est jure* will not prevail.[3]

265. One who has notice of a prior equity may resist its enforcement under cover of want of notice in his immediate vendor.[4] Thus if A. were the holder of an estate which was subject to a secret trust, which was known to C., and A. were to convey the estate to B., an innocent purchaser who had no notice, and B. should afterwards sell to C., the latter could protect himself against the claims of A.'s *cestui que trust*, by setting up the want of notice in B., his immediate vendor. The reason of this rule is obvious. It is designed not for the benefit of C., but for that of B. For it might be possible that after the sale to B. something would occur which would put all the world upon notice of the trust, and no one could thereafter take the estate unaffected with notice. The estate, therefore, would be locked up in B.'s hands, and rendered unsalable, because he could never find a purchaser who was free from notice.[5] To protect B., therefore, the rule has

[1] Phillips *v.* Phillips, *supra.*

[2] Phillips *v.* Phillips; Ford *v.* White, 16 Beav. 120; Downer *v.* The Bank, 39 Verm. 25.

[3] Rice *v.* Rice, 2 Drewry, 73; Judson *v.* Corcoran, 17 How. 612.

[4] Bracken *v.* Miller, 4 Watts & Serg. 102; Church *v.* Church, 1 Casey, 278; Fletcher *v.* Peck, 6 Cranch, 87; Dana *v.* Newhall, 13 Mass. 498; Rutgers *v.* Kingsland, 3 Hals. Ch. 178, 658; Halstead *v.* The Bank of Kentucky, 4 J. J. Marsh. 554. Note to Basset *v.* Nosworthy, 2 Lead. Cas. Eq. 33, (4th Am. ed.).

[5] "It is a well-settled rule of this Court that a man who is a purchaser with notice himself from a person who bought without notice, may protect himself under the first purchaser. The reason is to prevent a stagnation of property, and because the first purchaser, being entitled to hold and enjoy, must be equally entitled to sell." Bumpus *v.* Platner, 1 Johns. Ch. 213, by Chancellor Kent.

been laid down as above set forth.[1] If, however, in the case above put, B. should sell again to A., or the estate should afterwards by *mesne* conveyances come into A.'s hands, the trust would re-attach; the reason of this being that it would be a gross outrage to allow the man wh had originally perpetrated the wrong to reap the benefit of it, while, at the same time, it would be no hardship upon B., for only one customer (A.) would thus be removed from the market.[2]

A person who has no notice, will not be affected by notice on the part of his immediate vendor. Whenever the chain of conveyances reaches an innocent purchaser for value, who takes the legal title, the doctrine of notice no longer applies.[3]

266. Important questions in the doctrine of notice grow out of the consideration of the *time* when the notice is given.

It is clear that notice ought to bind if it is given, or presumed to be given, before the purchaser either acquires the legal title or parts with his money. It is equally clear that notice after conveyance and payment of the consideration is too late. What then is the rule in the two intermediate cases which sometimes occur—viz., *first*, where a vendee gets the legal title, but notice comes to him before he pays the purchase-money; and, *second*, where he pays the purchase-money in ignorance of the prior equity, but is affected with knowledge of the same before obtaining his deed?

In England the rule is that in order to protect a purchaser, the transaction must be complete in both particulars before notice; that is to say, the vendee must actually have received his conveyance and paid his money. If he has done only one of these, his right will be inferior to the right of the holder of the prior equity. He must, to be protected, hold the legal title, and have paid the full amount of the purchase-money.[4]

[1] See Lowther *v.* Carlton, 2 Atk. 242; Harrison *v.* Forth, Prec. Ch. 15; Fletcher *v.* Peck, 6 Cranch, 133; Boynton *v.* Rees, 8 Pick. 329; Mott *v.* Clark, 9 Barr, 399; Curtis *v.* Lunn, 6 Munf. 42; Lindsey *v.* Rankin, 4 Bibb, 482; Perry on Trusts, §§ 222, 830.

[2] See Church *v.* Ruland, 14 P. F. Sm. 444; Ashton's Appeal, 23 Id. 153; Troy City Bank *v.* Wilcox, 24 Wis. 671; Kennedy *v.* Daly, 1 Sc. & Lef. 379; Perry on Trusts, § 222.

[3] Demarest *v.* Wynkoop, 3 Johns. Ch. 147.

[4] See note to Basset *v.* Nosworthy, 2 Lead. Cas. Eq. *77; Tourville *v.* Naish, 3 P. Wms. 307; Story *v.* Windsor, 2 Atk. 630; Wigg *v.* Wigg, 1 Atk. 384;

267. In the United States, also, the rule is the same in cases in which the legal title is conveyed, but the purchase-money not paid, at the time of the notice.[1] In such a case the purchaser has no equity for he has lost nothing; and even if he has given security for the purchase-money, he could not lose, because he could set up the failure of title as a defence.[2]

But when there has been a payment of purchase-money in part or in whole, and notice then intervenes before the acquisition of the legal title, the English rule is followed in the courts of some of the United States,[3] but in others a different doctrine is held.[4] Thus, in Pennsylvania and some other States, a payment of part of the purchase-money is a protection *pro tanto*.[5]

268. Notice is either *actual* or *constructive*, and actual notice may be again divided into *direct* or *positive* notice, and *indirect*, *implied*, or *presumptive* notice.[6]

Actual notice consists either in direct information of a fact brought directly home to a party; or in a knowledge of circumstances leading to a knowledge of such fact.[7] It embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which knowledge may be inferred.[8] In the first case, the notice is direct or positive; in the second it is indirect, implied or presumptive.

Constructive notice is notice which is fastened upon a party by presumption of law deduced from facts and circumstances—the facts and circumstances which give rise to the presumption

2 Sug. V. and P. 523; Perry on Trusts, § 221. See, however, 2 Dart V. and P. 760.

[1] See Blanchard *v.* Tyler, 12 Mich. 339; Palmer *v.* Williams, 24 Id. 333; Murray *v.* Ballou, 1 Johns. Ch. 566; Patten *v.* Moore, 32 N. Hamp. 382; McBee *v.* Loftis, 1 Strob. Eq. 90; Perry on Trusts, § 221.

[2] Perry on Trusts, § 219.

[3] See Penfield *v.* Dunbar, 64 Barb. 239; Keys *v.* Test, 33 Ill. 316; Haughwaut *v.* Murphy, 6 C. E. Green, 118; Note to Basset *v.* Nosworthy, 2 Lead. Cas. Eq. 75.

[4] Notes to Basset *v.* Nosworthy, 2 Lead. Cas. Eq. 75.

[5] See Youst *v.* Martin, 3 Serg. & R. 423; Bellas *v.* M'Carty, 10 Watts, 13; Juvenal *v.* Jackson, 2 Harris, 519; Frost *v.* Beekman, 1 Johns. C. R. 288; Florence Sewing Machine Co. *v.* Ziegler, 58 Alab. 221; Paul *v.* Fulton, 25 Missouri, 156. See, also, Fraim *v.* Frederick, 32 Tex. 294.

[6] This division is suggested by the language of the court in Flagg *v.* Mann, 2 Sumn. 556. See, also, Kettlewell *v.* Watson, 21 Ch. D. 704; Cave *v.* Cave, 15 Id. 643.

[7] Mayor *v.* Williams, 6 Maryl. 235; Harper *v.* Ely, 56 Ill. 194.

[8] Williamson *v.* Brown, 15 New York, 354.

requiring proof—but the presumption itself, when the facts are once established being incapable of being disproved. It is a legal inference from established facts, which, like other legal presumptions, does not admit of dispute; or, to use the definition usually given, it is no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted.[1]

The difference between implied or presumptive notice (which is here treated as a division of actual notice) and constructive notice is that the former is a presumption or inference of *fact*, which is capable of being explained or contradicted; while the other is a conclusion of law which is not permitted to be controverted. To illustrate the difference between the two: Anything which puts a person upon inquiry is said to amount to notice.[2] He is bound, if circumstances point out a path of investigation, to follow it. If he makes no inquiries, the presumption is that he has improperly turned away from a knowledge of the true state of the case, and he is, therefore, presumed as a conclusion of fact to know what he might have informed himself of. But if he *does* inquire, and does not, after an honest effort, succeed in discovering the fact, the presumption of knowledge will be rebutted. On the other hand, notice by the registration of a deed is an example of constructive notice. Of this registry, a party is, under the recording acts, bound to take notice; his knowledge is a conclusion of law; it is a presumption *juris et de jure*, and, as such, is incapable of being refuted.[3]

Actual notice must consist in certain and definite information, as distinguished from vague rumors;[4] and, as a general rule, it may be stated that notice must come from some person who is interested in the property, for a purchaser is not bound to attend to statements by mere strangers.[5] But as actual notice cannot

[1] 2 Sug. V. & P. 755, (528, 8th Am. ed.). See, also, Bell *v.* Twilight, 2 Foster, 500; Rogers *v.* Jones, 8 N. H. 270; Williamson *v.* Brown, 15 N.Y. 354; Cresson *v.* Miller, 2 Watts, 274; McCray *v.* Clark, 1 Norris, (Pa.) 461; notes to Le Neve *v.* Le Neve, 2 Lead. Cas. Eq. 152, 157.

[2] Gollober *v.* Martin, 33 Kansas, 252.

[3] See Kettlewell *v.* Watson, 21 Ch. D. 704.

[4] Williamson *v.* Brown, 15 N. Y. 354.

[5] Butler *v.* Stevens, 26 Maine, 484; The City Council *v.* Page, 1 Spear's Eq. 159; Kerns *v.* Swope, 2 Watts, 75; Lamont *v.* Stinson, 5 Wis. 443; Woods *v.* Farmere, 7 Watts, 382; Churches *v.* Guernsey, 3 Wright, 86; Barnhart *v.* Greenshields, 28 Eng. L. & Eq. 77.

mean anything more or higher than direct knowledge, it is difficult to see how a party can disregard information concerning a title, as to which he is in negotiation, even though coming from a stranger,[1] and hence it has been stated to be the rule, and this statement has been approved by judicial authority, that notice "need not come from a party or his agent, but it is sufficient if it be derived *aliunde*, provided it be of a character likely to gain credit."[2]

Notice to an agent is notice to the principal; and it is to be considered (as far as the principal is concerned) as constructive notice; because the principal and agent, in matters within the scope of the latter's authority, are regarded, in the eye of the law, as one.[3]

It has been held in many cases that the notice to the agent in order to affect the principal, must be in the same transaction in which the former is acting on behalf of the latter.[4] Thus, a client (it has been said) could not be affected with notice of a fact of which his counsel has obtained information when acting on behalf of another party. But the rule is now otherwise in England; and the change was adopted in the case of The Distilled Spirits, in the Supreme Court of the United States.[5]

Possession is notice. This doctrine is incidentally mentioned by Blackstone. "The trustee," he says, in explaining the law of

[1] Ripple *v.* Ripple, 1 Rawle, 386; Wilcox *v.* Hill, 11 Mich. 256; American note to Le Neve *v.* Le Neve, 2 Lead. Cas. Eq. 146.

[2] Story's Eq. § 400, b.; Butcher *v.* Yocum, 11 P. F. Sm. 170; Mulliken *v.* Graham, 22 Id. 484; Rupert *v.* Mark, 15 Ill. 542; Cox *v.* Milner, 23 Id. 476; Curtis *v.* Mundy, 3 Met. 407.

[3] Hough *v.* Richardson, 3 Story, 660; Bowman *v.* Wathen, 1 Howard, 195; Astor *v.* Wells, 4 Wheat. 466; Westervelt *v.* Haff, 2 Sandf. Ch. 98; Watson *v.* Wells, 5 Conn. 468; Bracken *v.* Miller, 4 Watts & Serg. 102; Jones *v.* Bamford, 21 Iowa, 217; Kennedy *v.* Green, 3 Myl. & K. 699, 719; Williams *v.* Williams, 17 Ch. D. 437; Kettlewell *v.* Watson, 21 Id. 685.

[4] Warrick *v.* Warrick, 3 Atk. 294. See, also, Bracken *v.* Miller, 4 Watts & Serg. 111; Smith's Appeal, 11 Wright, (Pa.) 128; Houseman *v.* The Building Association, 31 P. F. Sm. 262; Roberts *v.* Fleming, 53 Ill. 198; Keenan *v.* The Missouri Ins. Co., 42 Iowa, 126; Bierce *v.* The Red Bluff Hotel, 31 Cal. 160. Notes to Le Neve *v.* Le Neve, 2 Lead. Cas. Eq. 170.

[5] Warner *v.* Hall, 53 Mich. 372.

[6] 11 Wallace, 366. See, also, Dresser *v.* Norwood, 17 C. B. (N. S.) 466; Hart *v.* The Farmers' Bank, 33 Verm. 252; 2 Sug. V. & P. 532 (8th Am. ed.).

uses and trusts, "is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice, which, *as the cestui que trust is generally in possession of the land*, is a thing that can rarely happen."[1] In other words, it is taken for granted, in the sentence just quoted, that as against an equitable owner *in possession*, no purchaser can be heard to allege that he acquired the legal title without knowledge of the rights of the equitable owner, or more briefly, Blackstone assumes it to be settled law that notice is imputed by possession.

The modern English doctrine upon the subject may be stated to be that where a man is of right, and *de facto*, in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property conflicting or inconsistent with the title, or alleged title under which he is in possession, or which he has a right to connect with his possession of the property; and, further, that a man who knows, or who cannot be heard to deny that he knows, another to be in possession of certain property, cannot for any civil purpose, as against him at least, be heard to deny having thereby notice of the title under which, or in respect of which, he is and claims to be in that possession. These are the propositions which were laid down by Lord Justice Knight Bruce in Holmes *v.* Powell,[2] and were said by that judge to be based upon the language of Lord Eldon.[3] They are thoroughly sustained by the English authorities.[4]

In the United States, also, the doctrine was recognised at an early day. In Billington *v.* Welsh,[5] the existence of the general rule was assumed as entirely well settled, and its application was refused only on account of the particular circumstances of the case; and in all the Federal and State Courts where the question has been raised, it has been treated as one of the

[1] 2 Black. Com. 341.

[2] 8 De G., M. & G. 572, 580-581.

[3] In Allen *v.* Anthony, 1 Meriv. 282.

[4] Smith *v.* Low, 1 Atk. 489; Taylor *v.* Stibbert, 2 Ves. Jr. 437; Daniels *v.* Davison, 16 Id. 249; Bailey *v.* Richardson, 9 Hare, 734; Cavender *v.* Bulteel, L. R., 9 Ch. 79; Wilson *v.* Hart, L. R., 1 Id. 467; Note to Le Neve *v.* Le Neve, 2 Lead. Cas. Eq. 63. See Allen *v.* Seckham, 11 Ch. D. 790.

[5] 5 Binney, 129.

fundamental principles by which the acquisition and enjoyment of real property are controlled.[1]

Notice by possession has been termed in many decisions, "constructive" notice;[2] and the English doctrine as stated above would seem to treat notice by possession as a presumption of law. But, on the other hand, this presumption has been held capable of being rebutted,[3] and the better opinion would, therefore, seem to be that notice by possession is to be considered as implied or presumptive notice merely.[4]

269. Constructive notice has been already defined, although the courts have not unfrequently hesitated to say with precision in what it shall consist; and the tendency in modern decisions is to limit the sphere of its operation.

The definition stated in a preceding paragraph has been given with not a little diffidence, as it seems presumptuous, in the highest degree, to attempt to define what constructive notice is, when great authorities have endeavored to do so without success.[5]

Vice-Chancellor Wigram, in Jones *v.* Smith,[6] divided constructive notice into two classes, as follows—first, cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered or in some way affected, and the court has, thereupon, bound him with constructive no-

[1] Warren *v.* Richmond, 53 Ill. 22; Hubbard *v.* Long, 20 Ia. 149; Sears *v.* Munson, 23 Id. 380; Glidewell *v.* Spaugh, 26 Ind. 319; McKinzie *v.* Perrill, 15 Ohio St. 162; Gouverneur *v.* Lynch, 2 Paige, Ch. 300; Chesterman *v.* Gardner, 5 Johns. Ch. 32; McKecknie *v.* Hoskins, 23 Maine, 230; Davis *v.* Hopkins, 15 Ill. 519, 526; Rupert *v.* Mark, Id. 542; Prettyman *v.* Wilkey, 19 Ill. 241; Keys *v.* Test, 33 Id. 316; Disbrow *v.* Jones, Harr. 48; Bayard *v.* Norris, 5 Gill, 483; Webber *v.* Taylor, 2 Jones Eq. 9; Cabeen *v.* Breckenridge, 48 Ill. 91; Kelley *v.* Stanbery, 13 Ohio, 426; Money *v.* Ricketts, 62 Miss. 209; Bratton *v.* Rogers, Id. 281; Krider *v.* Lafferty, 1 Whart. 303; Sailor *v.* Hertzog, 4 Id. 259; Landes *v.* Brant, 10 How. 375; Hughes *v.* United States, 4 Wall. 232; Leach *v.* Ansbacher, 5 P. F. Sm. 85; Meehan *v.* Williams, 12 Wright, 238.

[2] Patten *v.* Moore, 32 N. H. 384; Williams *v.* Sprigg, 6 Ohio, N. S. 585; Gouverneur *v.* Lynch, 2 Paige, 300; Sailor *v.* Hertzog, 4 Whart. 265; Jaques *v.* Weeks, 7 Watts, 275; Hackwith *v.* Damron, 1 Mon. 238; Scroggins *v.* McDougald, 8 Alab. 385; Note to Le Neve *v.* Le Neve, 2 Lead. Cas. Eq. 182. See Article on Constructive Notice in 17 Am. Law Rev. 849.

[3] Leach *v.* Ansbacher, 5 P.F. Sm. 85.

[4] See Flagg *v.* Mann, 2 Sumn. 556; Williamson *v.* Brown, 16 N. Y. 355.

[5] See 2 Sug. V. and P. 470.

[6] 1 Hare, 43. See Reed *v.* Gannon, 50 N. Y. 345.

tice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, encumbrance, or other circumstance affecting the property, of which he had actual notice; and, secondly, cases in which the court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice.[1] To these two classes may, perhaps, be added a third, viz., cases in which the party charged is presumed by the policy of the law, or by virtue of the provisions of some statute, to be cognisant of some proceedings pending, or act done, in relation to the property in question, whereby its title is affected.

Of the first of these classes of constructive notice an instance will be found in Penny *v.* Watts, a decision which has carried the doctrine under consideration very far, and which has, therefore, been criticized by great authority; but which is, nevertheless, with this qualification, a good illustration of the doctrine itself.[2]

Of the second class, Birch *v.* Ellames[3] (where a mortgagee, who had notice of the deposit of title deeds, but avoided inquiring the purpose for which it had been made, was held to be affected with notice of that purpose) is an example.

It is, moreover, perfectly well settled that a purchaser will have constructive notice of everything which appears in any part of the deeds or instruments which prove and constitute the title purchased, and is of such a nature as if brought directly to his knowledge would amount to actual notice.[4] And where it is the duty of a person to demand the production of title

[1] See Babcock *v.* Lisk, 57 Ill. 329; Boxheimer *v.* Gunn, 24 Mich. 379.

[2] Penny *v.* Watts, 1 MacN. & G. 150. In this case, where a man who claimed under a marriage settlement as a purchaser without notice, had notice previous to his marriage that a legatee had given up her legacy under a will in favor of the intended wife, to whom the estate upon which it was charged belonged, and which was comprised in the subsequent marriage settlement, and had, also, notice that the intended wife had in consequence devised to the legatee a portion of the estate, and that the legatee was dead; it was held to be notice, as leading to an inquiry, of an equitable reversionary title in the husband of the legatee under a subsequent agreement with the lady, the devisor, before her marriage, to convey the devised estate to him. See 2 Sug. V. and P. 550 (8th Am. ed.).

[3] 2 Anstr. 427.

[4] American note to Le Neve *v.* Le Neve, 2 Lead. Cas. Eq. 168, 169; George *v.* Kent, 7 Allen, 16; Montefiore *v.* Brown, 7 H. L. Cas. 241.

deeds, he will be held to have notice of all the facts of which the production would have informed him.[1]

270. The third class of cases includes those in which notice is given by registration of conveyances, and by *lis pendens*—the former depending upon statutory regulations—the latter upon a general principle of law which discourages alienation of the subject of a suit pending litigation.

The doctrine of constructive notice under the recording acts is one which, of course, depends, both in England and in this country, upon statute; and, stated in general terms, it is simply this: that where an instrument, which is entitled to be recorded, is duly executed and acknowledged, and is recorded in the proper territorial limits, such a registration is notice of the contents of the instrument,[2] and of all legal and equitable rights and titles created thereby, to any person claiming from or under the same grantor, by virtue of any title which existed in him at the time of the date of the duly recorded conveyance.[3] And it may be further stated that actual knowledge on the part of a subsequent grantee, of the existence of a prior unrecorded deed, will be equivalent, so far as he is concerned, to registry, and will be so treated both at law and in equity; but whether or not the same effect will be given to merely constructive notice of a prior unrecorded deed, is a question upon which the authorities in the different States are not uniform.

271. It will be observed, by referring to the above general statement, that constructive notice arises from the recording of those instruments only which are required to be registered. Thus (for example), where personal property is conveyed by a registered deed, the registry is not of itself constructive notice of the transfer, for transfers of such property are not required to be registered. And this was held to be the case even where the deed conveyed real as well as personal property, and was, therefore, a recordable instrument as a conveyance of realty.[4]

[1] Peto *v.* Hammond, 30 Beav. 509; Kellogg *v.* Smith, 26 N. Y. 18. See Sug. V. and P., Chap. XXIV., where the whole subject of notice is discussed at length, and the cases examined.

[2] See Bancroft *v.* Consen, 13 Allen 50.

[3] 4 Kent's Com. 174, 175 (11th ed.); 2 Sug. V. and P. 539 (8th Am. ed.).

[4] Pitcher *v.* Barrows, 17 Pick. 361. See Boggs *v.* Varner, 6 Watts & Serg. 469.

If, therefore, the deed is one which is not required or authorized by law to be recorded, the mere act of putting it on record cannot affect subsequent purchasers, with notice of its contents or of any rights claimed under it. And the same rule will apply to cases in which deeds are not executed or acknowledged in the manner and form to entitle them to be recorded.[1]

Conveyances, to operate by way of constructive notice, must also be recorded within the territorial limits prescribed by the statute. Therefore, where a deed is recorded in the wrong county or in the wrong state, the record cannot operate as notice.[2] Nor is the record notice to any one except those who claim title under the same grantor.[3]

272. It was decided in the year 1747, in the leading case of Le Neve *v.* Le Neve,[4] that a registered will be postponed to an unregistered conveyance, if the purchaser under the former has notice at the time, of the existence of the latter. This decision has been the subject of much regret in England, as it has been supposed (and with no little justice) to infringe upon the policy of the Registration Acts; but it has, nevertheless, been followed in a number of authorities; and the law must be considered as settled in accordance with that decision.[5] A similar view of the law has been adopted in the United States; and the general rule is held to be that actual knowledge of a prior unrecorded deed will operate to postpone the subsequent purchaser.[6]

[1] See, upon this subject, Stevens *v.* Morse, 47 N. Hamp. 532; Sumner *v.* Rhodes, 14 Conn. 135; Isham *v.* Bennington Iron Co., 19 Verm. 230; Green *v.* Drinker, 7 Watts & Serg. 440; 4 Kent's Com. (11th ed.) 174; Heister *v.* Fortner, 2 Binney, 40; Parkist *v.* Alexander, 1 Johns. Ch. 394; Graham *v.* Samuel, 1 Dana, 166; Thomas *v.* Grand Gulf Bank, 9 Sm. & M. 201; Brown *v.* Budd, 2 Carter, (Ind.) 442; Work *v.* Harper, 24 Miss. 517; Parret *v.* Shaubhut, 5 Minn. 323.

[2] Astor *v.* Wells, 4 Wheat. 446; Kerns *v.* Swope, 2 Watts, 75; Hundley *v.* Mount, 8 Sm. & Marsh, 387; Lewis *v.* Baird, 3 McLean, 56; Crosby *v.* Huston, 1 Tex. 203.

[3] Stuyvesant *v.* Hall, 2 Barb. Ch. 151; Lightner *v.* Mooney, 10 Watts, 412; Woods *v.* Farmere, 7 Watts, 382; Bates *v.* Norcross, 14 Pick. 224; George *v.* Wood, 9 Allen, 80; Crockett *v.* Maguire, 10 Missouri, 34; Tilton *v.* Hunter, 24 Maine, 29; Leiby *v.* Wolf, 10 Ohio, 83.

[4] Amb. 436; 3 Atk. 646; 1 Ves. 64; 2 Lead. Cas. Eq. 35 (4th Eng. ed.).

[5] See Wyatt *v.* Barwell, 19 Ves. 439; Chadwick *v.* Turner, 34 Beav. 634; L. R., 1 Ch. 310; Neve *v.* Pennell, 2 Hem. & M. 170; Ford *v.* White, 16 Beav. 120; Benham *v.* Keane, 1 Johns. & H. 685; 3 De G., F. & J. 318.

[6] Jackson *v.* Leek, 19 Wend. 339; Porter *v.* Cole, 4 Maine, 20; Rogers *v.*

273. But whether the same effect is to be given to *constructive* notice, is a question upon which the authorities are not uniform. In England, it is now held that constructive notice of an unregistered conveyance will be enough to postpone a subsequent purchaser, although he has registered his deed.[1] Similar decisions have been made in many of the United States. Thus, in New York and in Maryland, it has been held, that constructive notice is enough; and in Pennsylvania it is decided that open and notorious possession (which can operate only as constructive notice if the subsequent grantee is, in fact, ignorant of such possession) is sufficient notice of an unrecorded deed.[2] But even in these States the decisions upon this point have not been uniform;[3] while in many other States of the Union a contrary doctrine has been held.[4] It is, therefore, impossible to say that any uniform rule upon the subject exists on this side of the Atlantic.

In some States, as in Maine and Massachusetts, *actual* notice is required by statute.[5]

274. Before leaving the subject of notice it will be desirable to say a few words upon the doctrine of *lis pendens*, which may

Jones, 8 N. Hamp. 264; Garwood *v.* Garwood, 4 Halst. 193; Hamilton *v.* Nutt, 34 Conn. 501; Owens *v.* Miller, 29 Maryl. 144; Farnsworth *v.* Childs, 4 Mass. 637; Martin *v.* Sale, Bailey's Eq. 1; Speer *v.* Evans, 11 Wright, (Pa.) 141; Nice's Appeal, 4 P. F. Sm. 200; Pike *v.* Armstead, 1 Dev. Eq. 110; Vanmeter *v.* McFaddin, 8 B. Mon. 442; Ohio Ins. Co. *v.* Ledyard, 8 Alab. 866; Gibbes *v.* Cobb, 7 Rich. Eq. 54; American notes to Le Neve *v.* Le Neve, 2 Lead. Cas. Eq. 183.

[1] Wormald *v.* Maitland, 35 L. J. Ch. (N. S.) 69; 13 W. Rep. 832; In re Allen, 1 Ir. R. Eq. 455. See, however, Chadwick *v.* Turner, L. R., 1 Ch. 310; Agra Bank *v.* Barry, 6 Ir. R. Eq. 128; L. R., 7 App. Cas. 135.

[2] Tuttle *v.* Jackson, 6 Wend. 213; Price *v.* McDonald, 1 Maryl. R. 414; Krider *v.* Lafferty, 1 Whart. 303; Randall *v.* Silverthorn, 4 Barr, 173; Patton *v.* The Borough, 4 Wright, 206; and in California, see Mahoney *v.* Middleton, 41 Cal. 41. Possession was also held to be notice in Webster *v.* Maddox, 6 Maine, 256; Buck *v.* Holloway 2 J. J. Marsh. 178; Hopkins *v.* Garrard, 7 B. Mon. 312; Colby *v.* Kenniston, 4 N. Hamp. 262; Morrison *v.* Kelly, 22 Ill. 610; Landes *v.* Brant, 10 Howard, 348; Talbert *v.* Singleton, 42 Cal. 390.

[3] Scott *v.* Gallagher, 14 Serg. & R. 333; Boggs *v.* Varner, 6 Watts & Serg. 469; Dey *v.* Dunham, 2 Johns. Ch. 185; Ohio Ins. Co. *v.* Ross, 2 Maryl. Ch. Dec. 35; Gill *v.* McAttee, Id. 268.

[4] Harris *v.* Arnold, 1 R. Island, 125; Norcross *v.* Widgery, 2 Mass. 599; Bush *v.* Golden, 17 Conn. 594; Frothingham *v.* Stacker, 11 Mo. 77; Fleming *v.* Burgin, 2 Ired. Eq. 584; Flagg *v.* Mann, 2 Sumn. 491.

[5] See Glass *v.* Hulbert, 102 Mass. 34; Boggs *v.* Anderson, 50 Maine, 161; 2 Sug. V. and P. 545, note (8th Am. ed.).

be conveniently adverted to in this connection, although, as will be seen presently, it is one which does not, strictly speaking, rest upon the general doctrine of notice.

The doctrine of *lis pendens* is one by which a suit in chancery duly prosecuted in good faith, and followed by a decree, is constructive notice, to every person who acquires from a defendant *pendente lite* an interest in the subject-matter of the litigation, of the legal and equitable rights of the plaintiff, as charged in the bill and established by the decree.[1] It is a doctrine of courts of equity of ancient origin;[2] and, in this country, is founded on Chancellor Kent's opinion in Murray *v.* Ballou, decided in 1815.[3] It is based upon the theory that legal proceedings during their continuance are publicly known throughout the realm;[4] and while in some few cases in this country it has been rejected,[5] it has been very generally adopted throughout the United States, both in courts of law and in those of equity.[6]

The principal qualifications of this doctrine are that the specific property must be pointed out and sufficiently described by the proceedings; that it is notice only in relation to that property;[7] and that it applies only to *purchasers* from a party to the suit of the thing in controversy, and has no application to a third person whose interest subsisted before the suit was commenced, but was of a contingent and conditional character.[8]

[1] Haughwout *v.* Murphy, 7 C. E. Green, 531, 544. The suit must be *pending;* after decree it is not constructive notice. Worsley *v.* Scarborough, 3 Atk. 392; Hill on Trustees, 511; Sug. V. and P. 760, note *a.*

[2] See Sorrell *v.* Carpenter, 2 P. Wms. 482; Digs *v.* Boys, Toth. 187; 2 Sug. V. and P. 533, note (8th Am. ed.).

[3] 1 Johns. Ch. 566.

[4] Adams's Doct. of Eq. 157. See Cook *v.* Mancius, 5 Johns. Ch. 85.

[5] Newman *v.* Chapman, 2 Rand. 93; City Council *v.* Page, Spear's Eq. 159. See King *v.* Bill, 28 Conn. 593.

[6] Murray *v.* Lylburn, 2 Johns. Ch. 441; Watlington *v.* Howley, 1 Dessaus. 167; Owings *v.* Myers, 3 Bibb, 279; Wickliffe *v.* Breckinridge, 1 Bush, 427; Chaudron *v.* Magee, 8 Alab. 570; Tongue *v.* Morton, 6 Har. & Johns. 21; Green *v.* White, 7 Blackf. 242; Haven *v.* Adams, 8 Allen, 363; Baird *v.* Baird, Phillips, (Eq.) 317; Edwards *v.* Banksmith, 35 Georgia, 213; Parsons *v.* Hoyt, 24 Iowa, 154; Scarlett *v.* Gorham, 28 Ill. 319; Snively *v.* Hitechew, 9 P. F. Sm. 49; Jackson *v.* Warren, 32 Illinois, 331; Cooley *v.* Brayton, 16 Iowa, 10; Hurlbutt *v.* Butenop, 27 Cal. 50.

[7] Edmunds *v.* Crenshaw, 1 McCord Ch. 252; Lewis *v.* Mew, 1 Strob. Eq. 180; Green *v.* Slayter, 4 Johns. Ch. 38; Miller *v.* Sherry, 2 Wallace, 237.

[8] Hopkins *v.* McLaren, 4 Cowen, 678; Clarkson *v.* Morgan, 6 B. Mon. 441; Parks *v.* Jackson, 11 Wend. 442;

The doctrine of *lis pendens* had formerly been regarded as depending upon the general doctrine of notice; but in Bellamy *v.* Sabine,[1] the subject was elaborately examined by the English Court of Appeals in chancery, and the conclusion reached that the true theory of *lis pendens* is that it proceeds from the general rule which forbids alienation of contested property pending litigation. The reason of the rule is the necessity for putting an end to litigation, which would become interminable if the subject-matter thereof could be transferred, as often as the parties chose, from time to time. This view of the doctrine has been adopted in New Jersey.[2]

275. It has been already explained that the only persons who are entitled to avail themselves of want of notice as a defence are *bona fide* purchasers for a valuable consideration.

In other words, if a man wishes to hold property as against some other person who has a prior equitable right thereto, he must show that he is, in the first place, a *purchaser*, as distinguished from a mere *volunteer;* in the second place, that he is an *honest*, not a fraudulent purchaser; and lastly, that he has bought for a *valuable* consideration.

On the other hand, a purchaser who possesses these requisites is entitled to protect himself against any discovery in aid of the adverse claim. Ordinarily, as will be seen hereafter, a plaintiff in equity is entitled to discovery from the defendant—in other words, the latter must answer the bill of the former under oath. But to this general rule there are some exceptions, among them being this—that the defendant is not bound to disclose any imperfection in his title if he has honestly and in good faith paid for the estate in order to make himself the owner of it.

The principle of this plea was said by Lord Eldon to be this: "I have honestly and *bona fide* paid for this estate, in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title until you deliver me from the peril in which you state I have placed

French *v.* The Loyal Company, 5 Leigh, 627; Diamond *v.* Lawrence County, 1 Wright, (Pa.) 356.

[1] 1 De G. & J. 566.

[2] Haughwout *v.* Murphy, 7 C. E. Green, 544. See, also, Newman *v.* Chapman, 2 Rand, 93, decided by the Court of Appeals in Virginia in 1823, and Youngman *v.* Elmira Railroad Co., 15 P. F. Sm. 287.

myself in the article of purchasing *bona fide*."[1] Such a purchaser, when he has once put in that plea, may be interrogated and tested to any extent, as to the valuable consideration which he has given, in order to show the *bona fides* or *male fides* of his purchase, and also the presence or absence of notice; but when once he has gone through that ordeal successfully, then the court has no jurisdiction whatever to do anything more than to let him depart in possession of the estate, right or advantage which he has obtained, whatever that may be.[2] In the United States, generally, this position may be assumed by way of answer, instead of plea.

276. It is now settled in England, after some conflict of authority, that the plea of a *bona fide* purchaser for value is available for the protection of an equitable as well as of a legal title. The qualifications which are to be attached to this doctrine, and the extent to which it has been followed in the United States, have been already explained.[3]

A judgment-creditor, and a creditor deriving title under levy of execution, are not *purchasers* in the sense of being entitled to avail themselves of this plea.[4]

277. Under the general doctrine of notice arises the rule that purchasers from a trustee for sale must see to the application of the purchase-money. It is a general duty of trustees to use the trust property for the purposes of the trust alone; any other use of it is a breach of trust, and is unlawful.

It follows, that if trust property is sold, it must be sold for the benefit of the *cestui que trust;* in other words, the sale must enure to his advantage, and the proceeds must be applied in accordance with the design of the trust. It follows, moreover, that a disposition of the property for any other consideration than one moving to the trust estate, is a fraud upon the trust; and that no person who acquires the trust property under such

[1] Wallwyn *v.* Lee, 9 Ves. 24. See Sugden, V. and P., Chap. XXV., where the subject is discussed, and Story's Eq. Pleading, § 603.

[2] Pilcher *v.* Rawlins, L. R., 7 Ch. 269; per Lord Justice James. See, also, Zollman *v.* Moore, 21 Grat. 329.

[3] *Ante*, § 264.

[4] Whitworth *v.* Guagain, 3 Hare, 416; Hart *v.* Farmers' Bank, 33 Verm. 252; Finch *v.* Winchelsea, 1 P. Wms. 277; Ludwig *v.* Highley, 5 Barr, 132; Reed's Appeal, 1 Harris, 478; Morris *v.* Zieg ler, 21 P. F. Sm. 450.

circumstances with notice of the trust, can claim to hold it free and discharged from the rights of the *cestui que trust.*

Equity, for the protection of the interests of the *cestui que trust*, has engrafted a still further doctrine—which is, that in order to prevent any fraud from being practiced upon the rights of the beneficial owner, the purchaser from the trustee shall not hold the property freed from the trust, unless the purchase-money, after it is paid to the trustee, is duly appropriated by him to the purposes of the trust. This doctrine is known in equity as the duty on the part of the vendee of "seeing to the application of the purchase-money;" and it may be stated, very generally, in these terms, "that whenever the trust or charge is of a defined or limited nature, the purchaser must himself see that the purchase-money is applied to the proper discharge of the trust; but whenever the trust is of a general or uncertain nature, he need not see to it."[1]

Thus, where there was a trust of real estate to pay particular or scheduled debts, the purchaser was bound to see to the application of the purchase-money; if the trust was for the payment of debts generally, the purchaser was not so bound.

The reason of this distinction was, that the creator of the general trust must necessarily have intended that the receipt of the trustee should be a sufficient discharge, and that to him alone should be confided the duty and responsibility of a proper disposition of the trust assets. If the author of the trust *expressly* said in the instrument creating the same, that the receipt of the trustee would be sufficient, the purchaser was not bound to see to the application of the money; and it was considered that the same rule ought to apply when the power to give a sufficient discharge was implied.[2]

Sales of personal property by executors stand upon the same footing as sales of real estate under a trust to pay debts generally; the purchaser is not bound to see to the application of the money. Indeed, a purchaser of personalty was never bound, as a general rule, to see to the application.

[1] See Clyde *v.* Simpson, 4 Ohio, N. S. 445; Lewin on Trusts (5th ed.), 3; Sug. V. and P. 660, 661; Elliot *v.* Merryman, 1 Lead. Cas. Eq. 59, and notes.

[2] Lewin, 393.

278. Upon the principle stated above, a number of refinements and distinctions were engrafted by the English courts.

The doctrine was, however, a harsh one, and caused great inconvenience; and it has, after one or two unsuccessful attempts, been finally abrogated in England by a statute passed in 1859.

279. In the United States, the doctrine never was received with any favor.[2] The distinction between trusts for the payment of debts generally and the payment of scheduled debts, was not recognised; principally for the reason that lands in this country are, as a general rule, assets for the payment of debts; and that, therefore, where a general trust to pay debts attached to the whole realty, it brought the case within the rule applicable to trusts for the payment of debts generally. This tendency of the American courts not to adopt the doctrine of the necessity of seeing to the application of the purchase-money, has been further strengthened by legislation in some States.

It must be remarked, however, that even in the United States, a purchaser who *colludes* with an executor or trustee, will be held responsible for any misapplication of trust money growing out of the same transaction. But this falls under a different doctrine, viz., fraud.

[1] 22 & 23 Vic., c. 35, § 23. [2] Perry on Trusts, § 797.

CHAPTER IV.

EQUITABLE ESTOPPEL; ELECTION.

280. Definition of estoppel.
281. Different kinds of estoppel; legal estoppels *in pais*.
282. Equitable estoppel or estoppel by conduct; founded on fraud.
283. A party may be estopped by the assertion of an untruth. *Congregation* v. *Williams*.
284. A party may be estopped by the concealment of the truth. *Pickard* v. *Sears*.
285. Conduct which works an estoppel must be external to the contract.
286. Representations between party alleging estoppel and party estopped.
287. Representations between party alleging estoppel and third party.
288. Representations must be known to be false by party making them.
289. Must operate to deceive the party to whom they are made.
290. Intention that conduct should be acted on must exist.
291. Estoppel must be actually produced by the conduct.
292. Estoppel is limited to the representations made.
293. Estoppels in the cases of married women and infants.
294. Estoppels bind parties and privies.
295. Election; definition and example.
296. Of two kinds; expressed and implied.
297. Importance of the distinction between the two.
298. Circumstances under which the doctrine of election arises; illustrations.
299. After-acquired lands.
300. Powers.
301. Donor must give property of his own.
302. Property of the donee must be also given.
303. Gifts must be by the same instrument.
304. Manner in which election may be made.
305. Consequence of an election is compensation, not forfeiture.
306. Application of doctrine of election to case of creditors.

280. EQUITABLE estoppel is a doctrine of comparatively modern growth, but one, nevertheless, which has developed largely within the past few years, and which has received not a little consideration at the hands of judges and text writers.

An estoppel was defined by Lord Coke to be where "a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."[1] This definition, however, is rather strik-

[1] Co. Litt. 352, a The instance given by Littleton, upon which the remark cited is a comment, was where a man was estopped by his feoffment.

ing than accurate. A man is not prevented, by estoppel, from telling the truth. He is only barred from the assertion of a right or title by some previous action or conduct on his part, which would render the present assertion of his right unjust. Viewed in this light, estoppels are not odious suppressions of the truth, as they were considered to be in the old law; but are part of the machinery by which equitable conclusions are reached.[1]

The correct view of an estoppel is that taken in a recent work, where, indeed, the whole subject has been learnedly and elaborately discussed.[2] "Certain admissions," it is there said, "are indisputable, and estoppel is the agency of the law by which evidence to controvert their truth is excluded."[3] In other words, where an act is done, or a statement made by a party the truth or efficacy of which it *would be a fraud* on his part to controvert or impair, the character of an estoppel will be given to what would otherwise be a mere matter of evidence.[4] The law of estoppel, therefore, is a branch of the law of evidence, and it has become a part of the jurisdiction of chancery, simply because in equity alone, or rather by equitable construction alone, has that full effect been given to this species of evidence which is necessary to the due administration of justice.

281. Estoppels may arise either by matter of record, of deed, or *in pais*.[5]

It is only with estoppels of the latter class that we have anything to do—estoppels by record and by deed being common-law estoppels, and not the peculiar province of chancery jurisdiction.

Indeed, some estoppels *in pais* are recognised and acted upon at common law. These are stated by Lord Coke to be estoppels

[1] "The office of estoppels at law is like that of injunctions in equity, to preclude rights which cannot be asserted consistently with good faith and justice, and to prevent wrongs, for which there might be no adequate remedy." Van Rensselaer *v* Kearney, 11 How. 297. See, also, Doe *v.* Dowdall, 3 Houst. 377; Calder *v.* Chapman, 2 P. F. Sm. 359.

[2] Bigelow on Estoppel.

[3] Bigelow on Estoppel, Introduction, xliv. (2d edition).

[4] Commonwealth *v.* Moltz, 10 Barr, 530; Stephens *v.* Baird, 9 Cow. 274; Dewy *v.* Field, 4 Met. 381; Congregation *v.* Williams, 9 Wend. 147.

[5] See notes to the Duchess of Kingston's Case, 2 Sm. Lead. Cas. 617.

by livery, by entry, by acceptance of rent, by partition, and by the acceptance of an estate.[1] Of these the only two which prevail in America at the present day are estoppels by partition and by acceptance of rent.[2] But these are not equitable estoppels, for they are quite well recognised at common law. We may, therefore, put aside from consideration any estoppels which existed in the time of Lord Coke.[3]

Since Coke's time there has grown up a large class of estoppels *in pais*. Of these some may be considered legal estoppels (or those which are thoroughly recognised in courts of law), such as the estoppel which prevents a bailee from denying the title of the bailor, or the estoppel which displays itself in the warranty of genuineness implied by the acceptance and the endorsement of a bill of exchange or a promissory note;[4] and some, on the other hand, may be described to be purely equitable estoppels, or those estoppels which, although they may be recognised and acted upon in courts of law, nevertheless owe their origin and development to the ideas of justice entertained and promulgated by courts of chancery.[5] This particular class of estoppels *in pais* embraces what are known as estoppels by conduct; and this phrase may be, perhaps, used as the correlative term for equitable estoppels.[6]

282. Equitable estoppel, or estoppel by conduct, has its foundation in fraud considered in its most general sense; because a man cannot be prevented by his conduct from asserting a previous right, unless the assertion would be tantamount to a fraud upon a person who had subsequently acquired the right.[7]

[1] Co. Litt. 352, a.

[2] Bigelow on Estoppel, 346 (2d edition).

[3] Id.

[4] Bigelow on Estoppel, 391 (2d edition); 2 Sm. Lead. Cas. 658.

[5] The doctrine of estoppel *in pais* originated in chancery, but is now adopted in courts of law. Note to Duchess of Kingston's Case, 2 Smith's Lead. Cas., 711.

[6] Horn *v.* Cole, 51 N. Hamp. 290; Bigelow on Estoppel, 346 (2d edition). Estoppels of this class "extend to all cases where one party by his conduct wilfully or negligently induces another party to do or omit to do a particular thing." Wharton on Evidence, § 1143, citing (among other cases) Stevens *v.* Dennett, 51 N. Hamp. 324; Zuchtmann *v.* Roberts, 109 Mass. 53; Barnard *v.* Campbell, 55 N. Y. 456; Comstock *v.* Smith, 26 Mich. 306; People *v.* Brown, 67 Ill. 435; Peters *v.* Jones, 35 Iowa, 512; Dresbach *v.* Minnis, 45 Cal. 223; Thomas *v.* Pullis, 56 Mo. 211.

[7] "The principle runs through the whole doctrine of estoppel that a man is

It is the presence of this fraud, either in the intention of the party or the effect which would be worked by permitting him a negation, that distinguishes this species of estoppel from what was so considered by the common law.[1]

Equitable estoppel might, therefore, have been noticed under the general head of Fraud;[2] but it may properly receive a separate consideration, because in modern times this doctrine has assumed an importance which warrants its notice as a distinct head of Equitable Jurisdiction.

The representation which will operate as an estoppel must be one that is either a suggestion of falsehood, or a concealment of the truth when there is a duty to speak; it is always external to the transaction; and it may be a representation which takes place either in a transaction effected between the party alleging the estoppel and the party estopped, or in one between the party alleging the estoppel and some third party.[3]

283. The assertion of an untruth may operate to estop a party from subsequently setting up the truth. Thus, a tenant, when a distress was levied on certain goods upon the premises, declared that the goods did not belong to him, and the distress was thereupon abandoned. Afterwards the landlord brought an action of ejectment upon a clause in the lease, authorizing a

only prevented from alleging the truth when his assertion of a falsehood or his silence has been the inducement to *action* by the other party, which would result in loss if the opponent was permitted to gainsay what he had before asserted, or induced the other to believe by his acts." Patterson *v.* Lytle, 1 Jones, (Pa.) 53. See, also, Hill *v.* Epley, 7 Casey, 334; Rice *v.* Groffmann, 56 Mo. 435; Osborn *v.* Elder, 65 Ga. 360.

[1] Com. *v.* Moltz, 10 Barr, 531.

[2] Hill *v.* Epley, 7 Casey, 334.

[3] In Bigelow on Estoppel, 437 (2d ed.), it is said that the following elements must be present in order to an estoppel by conduct:—

1. There must have been a *representation* or *concealment* of material facts.

2. The representation must have been made with *knowledge* of the facts.

3. The party to whom it was made must have been *ignorant of the truth* of the matter.

4. It must have been made with the *intention* that the other party should act upon it.

5. The other party must have been *induced to act upon it.*

Compare this statement with the requisites to a fraudulent misrepresentation *generally*, stated *ante*, § 206.

See, also, the remarks of Cowen, J., in Dezell *v.* Odell, 3 Hill, 219, and the cases of Stevens *v.* Dennett, 51 N. H. 324; People *v.* Brown, 67 Ill. 435; Martin *v.* Zellerbach, 38 Cal. 300, 315; Acton *v.* Dooley, 74 Mo. 63; Trenton Banking Co. *v.* Duncan, 86 N. Y. 221; Timon *v.* Whitehead, 58 Tex. 290; Griffith *v.* Wright, 6 Col. 248.

re-entry for non-payment of rent, in case sufficient distrainable goods were not found on the premises. In this action the tenant endeavored to show that the goods on the premises in point of fact were his; but it was held that he was estopped from so doing by his previous untruth.[1] And so it has been held that a party who stands by at the sale of his property under a void authority and encourages purchasers to bid, is guilty of a direct fraud, and that under such circumstances a trust *ex maleficio* will arise which a court of chancery will enforce.[2]

284. The concealment of the truth often operates as an estoppel. It has been forcibly said that if a man is silent when it is his duty to speak, he shall not be permitted to speak when it is his duty to be silent.[3] Of this doctrine the leading case of Pickard *v.* Sears,[4] is an illustration. A mortgagee of personalty was there held to be estopped from asserting his title under the mortgage, because he had passively acquiesced in a purchase of the same by the defendant under an execution against the mortgagor. Another illustration may be found in the case, which not unfrequently occurs, of a party being estopped from taking objections to the form of an instrument because he was silent as to those objections at the time of the tender.[5]

[1] Cong. *v.* Williams, 9 Wend. 147; 2 Sm. L. C. 643. Also, Hefner *v.* Vandolah, 57 Ill. 520; Winchell *v.* Edwards, Id. 41; Leeper *v.* Hersman, 58 Id. 218; Horn *v.* Cole, 51 N. H. 287; Alexander *v.* Ellison, 79 Ky. 148; Rudd *v.* Matthews, Id. 479; Robb *v.* Shephard, 50 Mich. 189; Dodge *v.* Pope, 93 Ind. 480; Plummer *v.* Farmers' Bank, 90 Id. 386; Keating *v.* Orne, 27 P. F. Sm. 93; Mowry's Appeal, 94 Pa. St. 376.

[2] Nass *v.* Vanswearingen, 10 S. & R. 146; Buchanan *v.* Moore, 13 Id. 304; Com. *v.* Moltz, 10 Barr, 531; Miles *v.* Lefi, 60 Ia. 168.

[3] Niven *v.* Belknap, 2 Johns. 573.

[4] 6 Ad. & El. 469. See, also, Winton *v.* Hart, 39 Conn. 16; Railroad Co. *v.* Dubois, 12 Wall. 47; Chapman *v.* Chapman, 9 P. F. Sm. 214; Epley *v.* Witherow, 7 Watts 165; Carr *v.* Wallace, Id. 400; and Collier *v.* Pfenning, 34 N. J. Eq. 22.

[5] See, for instances of estoppel by silence, Hope *v.* Lawrence, 50 Barb. 258; Blake *v.* Ex. Ins. Co., 12 Gray, 265; Hoxie *v.* Home Ins. Co., 32 Conn. 21; Cambridge *v.* Littlefield, 6 Cush. 210; Ford *v.* Williams, 24 N. Y. 359; Gregg *v.* Von Phul, 1 Wall. 274; Hill *v.* Epley, 7 Casey, 334; Maple *v.* Kussart, 3 P. F. Sm. 348; Abrams *v.* Seale, 44 Alab. 297; Guthrie *v.* Quinn, 43 Id. 561; Ives *v.* North Canaan, 33 Conn. 402; Smith *v.* Smith, 30 Id. 111; Newell *v.* Nixon, 4 Wall. 572; Weber *v.* Weatherby, 34 Md. 656; Fletcher *v.* Holmes, 25 Ind. 458; Stagg *v.* Ins. Co., 10 Wall. 589; Booth *v.* Wiley, 102 Ill. 84; Moffitt *v.* Adams, 60 Ia. 44; Silloway *v.* Neptune Ins. Co., 12 Gray, 73; Husted's Appeal, 34 Conn. 488; Young *v.* Vough, 8 C. E. Green, 325; Muncey *v.* Jouet, 74 Ind. 409; Slocumb *v.* C., B. & Q. Rd., 57 Ia. 675; Sayers *v.* Collyer, 28 Ch. D. 103.

But silence will not always work an estoppel, for silence may not always amount to a fraud,[1] and, moreover, a person is not bound, under all circumstances, to speak out.[2] He may not, for example, be bound to declare that which is a matter of record, and of which he has a right to presume the other party has notice.[3] Nor will he be estopped by silence when he has had no opportunity to speak.[4]

285. Estoppel by conduct must consist in something which is external to the contract or transaction. To explain: the obligor in a bond may have a good defence to any action on the instrument by reason of its having been obtained by fraud or duress. Such obligor might be estopped from setting up such a defence against an innocent assignee, if the assignment had taken place upon the faith of his assertion that no defence existed. That would be an estoppel, and it would arise out of something external to the contract. But if no such assertion had been made, but the assignee were simply to argue that the obligor of the bond was estopped by the recital contained in the bond that "he was justly indebted" from showing that in fact he was *not* justly indebted, such an argument would be unsound, because, in that case, the estoppel would be attempted to be founded upon something in the contract itself, and this cannot be done. The reason of this distinction is simply that if the very words of a contract are to be taken as a representation of facts, which estops the party who makes the obligation from interposing a defence inconsistent with that representation, then all contracts must be deemed valid which appear to be so on their face, and neither usury, nor duress, nor fraud could any longer be alleged in defence.[5]

286. The representation which works an estoppel may sometimes take place in a transaction effected between the party alleging the estoppel and the party estopped. In other words,

[1] See Lawrence *v.* Luhr, 15 P. F. Sm. 241; Acton *v.* Dooley, 74 Mo. 63.

[2] See Corning *v.* Troy Factory, 39 Barb. 311; 40 N. York, 191; Shaw *v.* Spencer, 100 Mass. 382; Watson *v.* Knight, 44 Alab. 352; Hopper *v.* McWhorter, 18 Id. 229; Taylor *v.* Ely, 25 Conn. 250; Spencer *v.* Carr, 45 N. Y. 406; Elliott *v.* Ins. Co., 16 P. F. Sm. 26; Verrier *v.* Guillou, 97 Pa. St. 63; Counterman *v.* Dublin, 38 Ohio St. 515.

[3] Rice *v.* Dewey, 54 Barb. 455; Bales *v.* Perry, 51 Missouri, 449.

[4] Davidson *v.* Barclay, 13 P. F. Sm. 417.

[5] Wilkinson *v.* Searey, 74 Alab. 240.

[6] Clark *v.* Sisson, 22 N. Y. 312; Bigelow on Estoppel, 480 (1st ed.).

the parties to the transaction and the parties to the estoppel may be the same. Under this doctrine fall those cases in which a defence to a contract, which might otherwise have been taken, has been waived by the conduct of the party. Thus, a common instance is found in the cases in which insurance companies have been held incapable of raising objections to the insufficiency of preliminary proofs of loss, because they have by their conduct dispensed with the requirements of their policies.[1]

287. On the other hand, the representations which give rise to an estoppel may occur in a transaction which takes place between the party alleging the estoppel and some third party; in other words, the parties to the transaction and to the estoppel may be different. This embraces by far the largest class of estoppels by conduct, and is a species of estoppel which receives its greatest encouragement in courts of equity, and, therefore, most strictly deserves the term of equitable estoppel. Under this head fall the case of Pickard *v.* Sears,[2] cited above, and all those numerous cases in which a party is prevented from asserting his title, because, by active encouragement or equally effective silence, he has induced third parties to believe that no such title exists, and they have expended money, or in some way altered their position on the faith of such supposed non-existence.

Thus, it has been often held, that, where the owner of real estate encouraged another to erect valuable improvements upon the land, he was precluded from subsequently asserting his title.[3] So, if the owner of an estate stand by and see another expend money upon an adjoining estate, the latter relying upon an existing right of easement in the other estate, without which such expenditure would be useless, and do not interpose to prevent the work, he will not be permitted to interrupt the enjoyment of such easement.[4]

Under the same head fall those cases in which a party has

[1] Blake *v.* Exchange Ins. Co., 12 Gray, 265; Hoxie *v.* Home Ins. Co., 32 Conn. 21; Big. on Est., 454 (2d ed.).

[2] 6 Ad. & El. 469.

[3] Leeds *v.* Amherst, 2 Phillips, 117; Favill *v.* Roberts, 50 N. Y. 222; Wendell *v.* Van Rensselaer, 1 Johns. Ch. 354; Storrs *v.* Barker, 6 Id. 166; Truesdail *v.* Ward, 24 Mich. 134; Smith *v.* McNeal, 18 P. F. Sm. 164; Browne *v.* Trustees Baltimore Ch., 37 Md. 108, 124; Walker *v.* Flint, 3 McCrary, 507; Peery *v.* Hall, 75 Mo. 503. But see St. Louis Rd. Co. *v.* Green, 4 McCrary, 232, where the estoppel was limited to the improvements. Also, Kelly *v.* Wagner, 61 Miss. 299.

[4] Brooks *v.* Curtis, 4 Lans. (N. Y.) 283; Green *v.* Smith, 57 Vt. 268; Washburn on Easements, 62, 63.

been held to be precluded from denying that he occupied a certain position by reason of his having permitted himself to be held out to others as having occupied it. As, for instance, a man who allows his name to appear as a shareholder, to induce others to take stock, is estopped from denying that he is such. It would be a fraud upon those who are induced to part with their money by this holding out if he were afterwards allowed to falsify it.[1]

288. In order to an estoppel the representation must be known to be false by the party making it, and it must be believed to be true by the party to whom it was made. If the party against whom an estoppel is alleged does not know the real facts of the case, but speaks and acts under a mistake, he cannot be prejudiced by his action, unless, indeed, his ignorance is due to his own gross negligence. On the other hand, the party alleging the estoppel must not have been acquainted with the facts, otherwise the action of the other party would not mislead him.

Of that branch of the above rule which relates to mistake on the part of the person against whom the estoppel is alleged, instances will be found in those cases in which the owners of land have allowed the owners of adjoining lots to build over the boundary line under a mistaken impression in regard to the extent of their own property. Such acquiescence in adverse user, short of the time required by the statute of limitations, will not deprive a party of his rights, because he is under no obligation to assert a title of the existence of which he is ignorant.[2] If, however, the mistake is the result of gross negligence, the conduct of the party who thus unintentionally, but negligently, misleads another, may preclude him.[3]

But there is a distinction between mere acquiescence and positive acts. In the former case the rule is as just stated; but in the latter an estoppel may arise however honestly and igno-

[1] Bridger's Case, L. R., 9 Eq. 74; Mitchell's Case, Id. 363.

[2] Liverpool Wharf *v.* Prescott, 7 Allen, 494; 4 Id. 22; Thayer *v.* Bacon, 3 Id. 163; Brewer *v.* Boston and W. Rd. Co., 5 Met. 478; Proctor *v.* Putnam Machine Co., 137 Mass. 159; Laverty *v.* Moore, 33 N. Y. 658; Raynor *v.* Timerson, 51 Barb. 517; Reed *v.* McCourt, 41 N. Y. 435; Rutherford *v.* Tracy, 48 Missouri, 325; Kincaid *v.* Dormey, 51 Id. 552.

[3] Slim *v.* Croucher, 1 De G., F. & J. 518; Calhoun *v.* Richardson, 30 Conn. 210; Smith *v.* Newton, 38 Ill. 230; Stone *v.* Great Western Oil Co., 41 Ill. 85. See, also, Swan *v.* North British Co., 7 Hurl. & N. 601; 2 Hurl. & C. 175; Raley *v.* Williams, 73 Mo. 310.

rantly the act may have been done, upon the principle that where a loss must necessarily fall upon one of two innocent persons it shall be borne by him whose act occasioned it.[1]

289. The party setting up the estoppel must actually be deceived by the conduct of the other party. If he acts with a full knowledge of the rights and title of the other party, he cannot complain if that title is subsequently asserted. There can be no fraud when all the parties interested are equally informed of all the facts and mutually assent to them.[2]

290. The party against whom an estoppel is alleged must *intend* that his conduct should be acted upon, although he may not have intended to deceive.[3]

If there is no intention that the conduct should be an inducement to the action of others, there can be no estoppel by such conduct.[4] On the other hand, if there is an intention that the representation shall be relied upon by the other party, there will be an estoppel, although the representation may have been innocently made, and without an intention to deceive.[5]

The only exceptions to the rule as above stated appear to be the cases of Cornish *v.* Abington[6] and Manufacturers' Bank *v.* Hazard;[7] in which it was held that parties were estopped who had no intention whatever that their action should be relied upon by others. But these cases seem referable to the ground of negligence.

291. It is essential to an estoppel that it should be acted upon; that is to say, the conduct which is alleged to have produced an estoppel, must actually have been the inducing cause

[1] Beaupland *v.* McKeen, 4 Casey, 131; Paul *v.* Squibb, 2 Jones, 296; Miller's App., 3 Norris, 395; Burton's App., 93 Pa. St. 214; Lammon *v.* Hartsook, 80 Mo. 13. Also, Milligar *v.* Sorg, 5 P. F. Sm. 225; Diamond Coal Co. *v.* Fisher, 7 Harris, 267; McKelvy *v.* Truby, 4 W. & S. 323; Story's Eq., § 1537.

[2] Rapalee *v.* Stewart, 27 N. Y. 310; Bales *v.* Perry, 51 Mo. 449; Hepburn *v.* McDowell, 17 S. & R. 383; Wallis *v.* Truesdell, 6 Pick. 455; Whitney *v.* Holmes, 15 Mass. 152; Welland *v.* Hathaway, 8 Wend. 480–2; Lewis *v.* Ford, 67 Alab. 143.

[3] Freeman *v.* Cooke, 2 Exch. 653; Re Bahia & San Francisco Rd., L. R., 3 Q. B. 584. As to what is meant by intention that conduct shall be acted upon in estoppel, see Tiffany *v.* Anderson, 55 Iowa, 405.

[4] Holdane *v.* Cold Spring, 21 N. Y. 474; Mayenborg *v.* Haynes, 50 Id. 675; Kuhl *v.* Mayor of Jersey City, 8 C. E. Green, 84.

[5] Re Bahia & San Francisco Rd., L. R., 3 Q. B. 584; Continental Nat. Bank *v.* Nat. Bank of Com., 50 N. Y. 575; Gilbert *v.* Groff, 28 Hun (N. Y.) 50; Kirk *v.* Hartman, 13 P. F. Sm. 106, Bidwell *v.* Pittsburgh, 4 Norris, 417.

[6] 4 Hurl. & N. 549.

[7] 30 N. Y. 226; Horn *v.* Cole, 51 N H. 287; Big. on Est., 488 *et seq.* (2d ed.).

for the action of the party who seeks to set it up.[1] This may be illustrated by cases of dedication. If a man dedicates real estate to public use it is with the understanding that such dedication shall be accepted and acted upon by the public. If the public fail to act upon the dedication there can be no estoppel; for if no such action has taken place, it will be considered that the offer of dedication has not been accepted, and that, therefore, no estoppel has ensued.[2] On the other hand, if the dedication has been acted upon, this will be deemed an acceptance of the offer to dedicate, and the change in the position of the parties thus gives a contractual character to the admission which it would not otherwise possess.[3]

Many other instances, also, may be found in the books which are illustrative of the same principle, viz., that an estoppel must be acted upon, or, in other words, that the party setting up the estoppel must have sustained actual damage.[4]

292. It is important to consider to what extent, against whom, and in whose favor an estoppel may operate.

It is a sound and just rule that the estoppel will be limited to the representation made. Thus where a sheriff had a writ against A., but took B. into custody upon the false representation by B. that she was the party named in the writ, but detained her in custody after notice that she was not the party intended, it was held, that, although B. might be estopped from recovering damages for a false arrest, she would not be estopped from an action for the subsequent detention. The estoppel could not operate to justify the detention, for after notice that B. was not the real party the sheriff was no longer deceived by the representation.[5]

[1] State *v.* Laies, 52 Mo. 396; Van Deusen *v.* Sweet, 51 N. Y. 378; O'Mulcahy *v.* Holly, 28 Minn. 31; Askins *v.* Coe, 12 Lea (Tenn.) 672; Monks *v.* Belden, 80 Mo. 639.

[2] Baker *v.* Johnston, 21 Mich. 319; Hague *v.* West Hoboken, 8 C. E. Green 354.

[3] Wharton on Evidence, § 1152.

[4] Howard *v.* Hudson, 2 El. & B. 1; Stimson *v.* Farnham, L. R., 7 Q. B. 175; Hill *v.* Epley, 7 Casey, 334; Patterson *v.* Lytle, 1 Jones, (Pa.) 53; Musser *v.* Oliver, 9 Harris, 362; Troxell *v.* Lehigh Crane Iron Co., 6 Wright, 315; Ayres *v.* Wattson, 7 P. F. Sm. 360; Railroad Co. *v.* Dubois, 12 Wal. 47. See, also, Barker *v.* Binninger, 14 N. Y. 270; Malloney *v.* Horan, 49 Id. 111; Rivard *v.* Gardiner, 39 Ill. 125; Schmaltz *v.* Avery, 16 Q. B. 655; Helme *v.* Philadelphia Life Ins. Co., 11 P. F. Sm. 107; Wharton's Evidence, §§ 1150, 1155.

[5] Dunston *v.* Paterson, 2 C. B. N. S. 495; Tilton *v.* Nelson, 27 Barb. 595; Murray *v.* Jones, 50 Ga. 109; Bigelow on Estoppel, 451 (2d ed.).

293. It is sometimes difficult to determine whether estoppel by conduct will operate against married women and infants; and the cases on this subject are to a certain extent conflicting.[1] The true rule seems to be this: The contract of a person under disability cannot be made good by estoppel. Thus, if a married woman entered into an agreement (which, being made by a married woman, is void) for the sale of real estate, the circumstance that the purchaser went into possession under the contract, and made valuable improvements with the consent and encouragement of the *feme*, would not operate to estop the latter, because, as no remedy could possibly be had upon the void contract, it would be against the policy of the law to allow the same result to be reached through the indirect medium of an estoppel.[2] Nor would the case of the purchaser be made any better if the woman had represented herself to be *sole*. Such a representation could amount to no more than a covenant that she was *sole*, and her coverture would render such a covenant, as well as all others, void.[3]

But while an estoppel could not have the effect of rendering a married woman's contract valid, it might, nevertheless, in the absence of any agreement, operate to prevent her from asserting a right. Thus, if a married woman were to encourage A. to buy property of B., knowing that the title was not in B., but in herself, she would be estopped from subsequently asserting her title against A., for in this case there would be no attempt to enforce a contract of the married woman either directly or indirectly, and, therefore, there would be no reason for not applying the ordinary doctrine of estoppel.[4]

[1] Bigelow on Estoppel, 443 (2d ed.).

[2] Drury *v.* Foster, 2 Wal. 24; Lowell *v.* Daniels, 2 Gray, 161; Bemis *v.* Call, 10 Allen, 512; Merriam *v.* Boston Rd. Co., 117 Mass. 241; Glidden *v.* Strupler, 2 P. F. Sm. 400; Rumfelt *v.* Clemens, 10 Wright, 455; Keen *v.* Coleman, 3 Id. 299; Keen *v.* Hartman, 12 Id. 497; Williams *v.* Baker, 21 P. F. Sm. 476; Jones *v.* Templeton, 95 Id. 262; Davison's Appeal, Id. 394; Grim's Appeal, 105 Id. 385; Morrison *v.* Wilson, 13 Cal. 494; Rangeley *v.* Spring, 21 Me. 130; Concord Bank *v.* Bellis, 10 Cush. 276; Miles *v.* Lingerman, 24 Ind. 385; Kane Co. *v.* Herrington, 50 Ill. 232; Schnell *v.* Chicago, 38 Id. 382; Davidson *v.* Young, Id. 146; McLauren *v.* Wilson, 16 S. C. 402.

[3] Liverpool Ass'n. *v.* Fairhurst, 9 Ex. 422; Buchanan *v.* Hubbard, 96 Ind. 1.

[4] Connolly *v.* Branstler, 3 Bush, 702; Drake *v.* Glover, 30 Ala. 382; McCullough *v.* Wilson, 9 Harris, (Pa.) 436; Couch *v.* Sutton, 1 Grant's Cas. 114; Brinkerhoff *v.* Brinkerhoff, 8 C. E. Green, 477, 483; Carpenter *v.* Carpenter, 10 Id. 194; Stout *v.* Allison, 15 Brad. 222; Hendershott *v.* Henry, 63 Ia. 744. (See Bennett *v.* Strait, Id. 620.)

The same rule will apply to the conduct of an infant whereby he permits or encourages a purchaser to buy an estate of another. Under such circumstances, the infant will be equitably estopped from asserting his right to the estate.[1]

But, on the other hand, where the attempt is made to enforce a contract of a minor through the agency of estoppel, such an attempt will fail, just as in the case of contracts of *femes coverts*.[2]

An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up.[3]

294. An estoppel binds not only parties but privies.

Privies are of three kinds—of blood, of law, and in estate.[4] The application of the doctrine that estoppels bind privies is more striking in the case of estoppels by record and by deed; but it may be said that the same general rules apply to estoppels by conduct, and that persons may be precluded from asserting rights by the speech, the silence or the action of those as to whom they may have "mutual or successive relationship to the same rights of property."[5]

An estoppel cannot operate if the conduct of the party against whom an estoppel is alleged has been brought about by fraud.[6]

An equity akin to estoppel may be illustrated by the case of the Agra and Masterman's Bank. There certain parties were authorized by a letter of credit to draw upon the bank, and they who negotiated the bill were requested to "endorse particulars upon the back hereof." Certain bills were thereupon negotiated, and the holders on proving against the estate of the bank were met by a defence of a set-off claimed against the parties to whom the letter of credit had been issued. But it was held that the bank, by the terms of the letter of credit, had in effect invited parties to negotiate bills on the faith

[1] Overton *v.* Banister, 3 Hare, 503; Esron *v.* Nicholas, 1 De G. & S. 118; Thompson *v.* Simpson, 2 Jones & L. 110; Stikeman *v.* Dawson, 1 DeG. & S. 90; Wright *v.* Snowe, 2 Id. 321; Unity Ass'n *v.* King, 3 De G. & J. 64; Nelson *v.* Stocker, 4 Id. 458; Hall *v.* Timmons, 2 Rich. Eq. 120; Whittington *v.* Wright, 9 Ga. 23; Gihon's Estate, 15 Phila. 582; Bigelow on Estoppel, 447, *et seq.* (2d ed.)

[2] Wieland *v.* Kobick, 110 Ill. 16. See Burk *v.* Adams, 80 Mo. 504.

[3] Ketchum *v.* Duncan, 6 Otto, 696.

[4] Duchess of Kingston's Case, 2 Sm. Lead. Cas. 658, and notes.

[5] Bigelow on Estoppel, 74, 449; Wood *v.* Seely, 32 N. Y. 105; Parker *v.* Crittenden, 37 Conn. 148; Graves *v.* Rogers, 59 N. H. 452; Union Dimes Savings' Ins. *v.* Wilmot, 94 N. Y. 221.

[6] Wilcox *v.* Howell, 44 N. Y. 398; Mallalieu *v.* Hodgson, 16 Q. B. 689; Bigelow on Estoppel, 448.

of that letter; and that it was not in accordance with the doctrine of courts of equity to allow the bank, under such circumstances, to say that because there was a debt due to it from the persons to whom it had given the letter, therefore it would not pay the bills.[1]

The doctrine of estoppel is frequently called into operation when a party is compelled to make an election between two inconsistent benefits, or between the assertion of two rights which ought not to be insisted on simultaneously.

Under such circumstances, the party having once elected is estopped from asserting the right which he has chosen to abandon.[2]

295. An Election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under an instrument, and the retention of some property already his own, which is attempted to be disposed of in favor of a third party, by virtue of the same instrument. The doctrine rests upon the principle that a person claiming under an instrument shall not interfere by title paramount, to prevent another part of the same instrument from having effect according to its construction; he cannot accept and reject the same instrument.[3] It is a doctrine which is principally exhibited in cases of wills; but it has been applied, also, to cases of voluntary deeds, to cases of contracts for value resting upon articles, and to contracts completely executed by conveyance and assignment.[4]

The most common instance which is put of a case of an election, is where a testator gives money or land to A., and by the same will gives something of A.'s to B. Here A. must elect. He must either give effect to the will by allowing B. to have the property which the testator intended should go to him; or, if he

[1] In re Agra and Masterman's Bank, L. R., 2 Ch. 391.

[2] Mills *v.* Hoffman, 92 N. Y. 181; Bigelow on Estoppel, 503.

[3] Streatfield *v.* Streatfield, 1 Lead. Cas. Eq. 333, notes; Codrington *v.* Lindsay, L. R., 8 Ch. 578; Stephens *v.* Stephens, 3 Drew. 697, 701; Hall *v.* Hall, 1 Bland, 130; Clay *v.* Hart, 7 Dana, 1; Brown *v.* Ricketts, 3 Johns. Ch. 553; Marriott *v.* Sam. Badger, 5 Md. 306; Van Duyne *v.* Van Duyne, 1 McCart. 49; Gable *v.* Daub, 4 Wr. (Pa.) 217; Reaves *v.* Garrett, 34 Ala. 558; Brown *v.* Pitney, 39 Ill. 468; Wilbanks *v* Wilbanks, 18 Id. 17; O'Reilly *v.* Nicholson, 45 Mo. 160; Pemberton *v.* Pemberton, 29 Id. 409.

[4] Codrington *v.* Lindsay, L. R., 8 Ch. 587; Anderson *v.* Abbott, 23 Beav. 457; Brown *v.* Brown, L. R., 2 Eq. 481; Willoughby *v.* Middleton, 2 Johns. & H. 344.

chooses to disregard the will and retain his own property, he must make good the value of the gift to the disappointed beneficiary.[1]

296. Elections are said to be of two kinds, express or implied.[2] An express election is where a condition is annexed to a gift, a compliance with which is distinctly made one of the terms upon which the gift can, alone, be enjoyed. Thus, if a testator were to say, in so many words, that a legacy given by his will should only go to the legatee upon the stipulation that the latter should convey a piece of land, which was his own, to a third party; here would be an express condition, and the legatee would have to choose or elect between the legacy and the land. If he refused to convey the land, he would simply forfeit his legacy. But in the case stated in the preceding section, the duty to elect would not grow out of any express condition, but would be impliedly annexed by the law, under the general principle that a man shall not be allowed to claim the benefit of any instrument unless he is willing to carry out all its provisions. An equitable election differs from an election growing out of an express condition in this, viz., that in express conditions the result of a non-compliance is a forfeiture; whereas in elections growing out of an implied duty, the person who declines to make good the gift in specie, does not absolutely lose the benefit which is bestowed upon him, but is compelled only to give up so much of it as will amount to compensation for the disappointed beneficiary.[3]

297. The distinction between express and implied elections becomes of practical importance when the doctrine of election in equity is attempted to be applied to the case of void devises. For example: If a statute were to require that wills of real estate should be executed with certain formalities, and a testator were to make his will, not executed so as to pass real estate, whereby he should give a legacy to his heir upon the express

[1] Glenn *v.* Clark, 21 Grattan, 35.

[2] Hall *v.* Hall, 2 McCord Ch. 269, 306.

[3] Gretton *v.* Haward, 1 Swanst. 433. In his note to this case Mr. Swanston says that there are two propositions established by the authorities: 1st. That in the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints; and, 2nd. That the surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right. See *post*, § 305.

condition that the latter would make good a devise of real estate to a stranger, it is obvious that the devisee of the real estate would take no good title from the testator because of the informality in the execution of the will, but the heir would nevertheless be obliged to release to the stranger, otherwise he would forfeit his claim to the legacy.[1]

But, on the other hand, if the bequest to the heir were not made on this *express* condition, then the mere fact that the realty was devised to a stranger would not put the heir to his election; because in the case supposed, there would, in point of fact, have been no valid gift to the stranger, and there can be no election unless there are two gifts.[2] The distinction, therefore, between elections which depend upon the expressed intention of the testator, and those which depend upon his *presumed* intention, is not unfrequently of practical importance.

Exactly why this distinction should have been taken has been not a little questioned. Lord Eldon in Sheddon *v.* Goodrich[3] characterized it as one "such as the mind cannot well fasten upon," and other judges have expressed the same difficulty.[4] Nevertheless it is firmly established, and has been recognised in the courts of this country as well as in those of England.[5] The inclination of the courts, however, is manifestly to limit the distinction, and to put express and implied conditions, in this regard, upon the same footing.[6]

The doctrine of election is applicable to remote and contingent interests, as well as to those which are immediate and certain.[7]

298. In order that the necessity for an election shall take place, the testator must affect to dispose of property which is not his own,[8] and he must, also, make a valid gift of his own property. If both of these requisites do not occur there is no case for an election.

[1] Nutt *v.* Nutt, 1 Freem. Miss. Ch. 128.

[2] See Melchor *v.* Burger, 1 Dev. & Bat. Eq. 634; Snelgrove *v.* Snelgrove, 4 Dess. 274; Jones *v.* Jones, 8 Gill, 197.

[3] 8 Ves. Jr. 497. See, also, the remarks of the same chancellor in Ker *v.* Wauchope, 1 Bligh, 1.

[4] Cary *v.* Askew, 1 Cox, 241; Brodie *v* Barry, 2 Ves. & Beames, 127; City of Philadelphia *v.* Davis, 1 Whart. 510; Van Dyke's Appeal, 10 P. F. Sm. 488–489.

[5] Mc Elfresh *v.* Schley, 1 Gill, 181; Kearney *v.* Macomb, 1 C. E. Green, 189; De War *v.* Maitland, L. R., 2 Eq. 834; Orrell *v.* Orrell, L. R., 6 Ch. 302.

[6] Van Dyke's Appeal, 10 P. F. Sm. 490.

[7] Webb *v.* Shaftesbury, 7 Ves. 480; McQueen *v.* McQueen, 2 Jones's Eq. 16.

[8] See Box *v.* Barrett, L. R., 3 Eq. 244.

Two classes of cases have not unfrequently arisen by which both branches of this rule are illustrated.

The first of these arises when a widow, to whom a legacy has been given by her husband, claims dower out of the real estate devised. On the one hand, if the terms of the devise are such that they can only be satisfied by giving the devisee the land free from dower, the widow must, in this case, elect whether she will have her dower or the legacy.[1] This is a plain case of election. The husband has no power to give away his wife's dower, and all devises must ordinarily be subject to her right. But if the widow wishes to have the legacy, she cannot claim a benefit under the will, without also being compelled to make good its provisions by which her dower in the realty is given to a stranger.

On the other hand, a mere devise of real estate to a stranger, and a legacy to the wife, will not put the latter to her election; for it may be very possible that the testator intended her to have a double benefit, and that the devise was designed to be subject to the burden of dower.[2] Here is a case in which the testator cannot necessarily be said to have attempted to dispose of another's property, *i. e.*, his wife's dower; because *non constat* that he ever so designed to do. In such a case, therefore, there is no election. Between these two plain cases, however, a great many have arisen, where the discovery of the intention of the testator is exceedingly difficult.[3]

The inquiry always is, however, did the testator intend to give away his wife's interest in the realty? If he did, then she must elect. If he did not, then there is nothing to prevent her from claiming her legacy under the will, and at the same time asserting her right to the dower, as against the devisee.[4]

299. Another class of cases is where there is a devise of after-acquired lands which do not pass by effect of the devise, but to

[1] Butcher *v.* Kemp, 5 Mad. 61; Birmingham *v.* Kirwan, 2 Sch. & L. 444; Llewellyn *v.* Mackworth, Barnard. Ch. R. 445; Bacon *v.* Cosby, 4 De G. & Sm. 261.

[2] Adsit *v.* Adsit, 2 Johns. Ch. 448; Brown *v.* Caldwell, 1 Speer's Eq. 322. See, also, Herbert *v.* Wren, 7 Cranch, 370; Lord *v.* Lord, 23 Conn. 327; Hall *v.* Hall, 8 Rich. (Law) 407; Norris *v.* Clark, 2 Stock. Ch. 51; 1 Lead. Cas. Eq. 410 (American notes).

[3] See Lawrence *v.* Lawrence, 2 Vern. 366.

[4] Ellis *v.* Lewis, 3 Hare, 310; Pemberton *v.* Pemberton, 29 Missouri, 408.

the value of which the devisee may nevertheless become entitled by the doctrine of election. It is well known that by the English law a will, as to realty, spoke from its date, and did not, therefore, pass after-acquired lands. When, therefore, a testator devised lands, of which he afterwards became the owner, away from the heir, and by the same will gave the heir a benefit, a case for election arose.

The rule has by some authorities been supposed to be different. The case of a devise of after-required realty was supposed to fall under the same rule as a *void* devise, that is (for example), a devise by an infant, by a will not duly executed, or the like. But it has been justly pointed out that there is a distinction between a devise which is entirely void by reason of the incompetency of the party attempting to make it, or by reason of the invalidity of the instrument, and a devise which simply fails because the subject-matter is not capable of being disposed of by the testator. The latter falls clearly within the case of an attempt to dispose of property of which the testator is not the owner, and, therefore, presents a strict case of an election.[2]

It will be remembered that if the bequest to the heir is coupled with a direct stipulation that he shall give effect to a devise of after-acquired land, it will fall under the head of express conditions, and will be enforced under the doctrine of forfeiture, and not under that of equitable election, as was stated above.

300. Another case of election sometimes arises under powers. If, for example, A. has a power of appointment in favor of B., and in default thereof the property is limited to C., and A. exercises the power in favor of D., and by the same instrument gives a benefit to C., the latter must be put to his election. If he claims under the instrument, he must give effect to the defective execution of the power. If he claims adversely to the instru-

[1] See Hearle *v.* Greenbank, 3 Atk. 695; 1 Ves., Sr. 298; Rich *v.* Cockell, 9 Ves. 369; Sheddon *v.* Goodrich, 8 Ves. 481; Van Dyke's Appeal, 10 P. F. Sm. 481.

[2] Schroder *v.* Schroder, 1 Kay, 578; Hance *v.* Truwhitt, 2 Johns. & H. 216; American note to Streatfield *v.* Streatfield, 1 Lead. Cas. Eq. 333 (where the opinion of the court in the City of Philadelphia *v.* Davis, 1 Whart. 490, is criticized); McElfresh *v.* Schley, 2 Gill, 181; Kearney *v.* MaComb, 1 C. E. Green, 189; Maxwell *v.* Maxwell, 2 De G., M. & G. 705. See Orrell *v.* Orrell, L. R., 6 Ch. 303.

ment, he must compensate the disappointed appointee out of the benefit which the instrument confers upon him.[1]

So, also, if there is a power to appoint to two, and the donee of the power appoints to one only, and gives a legacy to the other, he cannot claim the legacy and also dispute the validity of the appointment.[2] But where a testatrix made an appointment under a power in favor of her son, which partially failed for remoteness, and made a general residuary appointment under the power to her daughters, to whom certain other benefits were also given; it was held that the daughters might claim the benefit of the appointment which had failed, without being put to their election in regard to their legacies.[3] The reason of this decision was, that the daughters claimed the benefit of the appointment which had failed, not as persons who took in default of a proper execution of the power, but under the general residuary appointment; in other words, they claimed this fund, as well as the legacy, under the will, and not by any title adverse to the will; hence there was no room for the doctrine of election. The rule as to election is to be applied only as between a gift under a will and a claim *dehors* the will and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will.[4] Where a person appoints to the object of the power, and gives him a legacy, and then directs him to settle the appointed property on persons who are not the objects of the power, a case of election is not raised, unless there is a clause of forfeiture on non-compliance with the directions.[5]

301. It was stated above, that one of the two requisites necessary to give rise to a case of election was that the donor should give property of his own.

This may, also, be illustrated by a reference to the execution of powers. If A. has a power of appointment among B., C. and

[1] 2 Sug. Pow. 148; note to Streatfield *v.* Streatfield, 1 Lead. Cas. Eq. 351; Whistler *v.* Webster, 2 Ves., Jr. 367; Coutts *v.* Acworth, L. R., 9 Eq. 519. See, also, Blackett *v.* Lamb, 14 Beav. 482; and the criticism in Snell's Eq. 174.

[2] In re Fowler's Trust, 27 Beav. 362; Woolridge *v.* Woolridge, Johnson, 63; Churchill *v.* Churchill, L. R., 5 Eq. 44; 2 Spence, 520; 2 Sug. Pow. 148.

[3] Wollaston *v.* King, L. R., 8 Eq. 165. See Wallinger *v.* Wallinger, L. R. 9 Eq. 301.

[4] Per James, V. C., in Wollaston *v.* King, L. R., 8 Eq. 174.

[5] King *v.* King, 15 Irish Ch. 479, overruling Moriarty *v.* Martin, 3 Irish Ch R. 26.

D., in default of the due execution of which B. is entitled to take; and A. exercises the power validly as to B., but invalidly as to C. and D.; B. is, nevertheless, entitled to make good his claim in default of the proper execution; because the benefit that he receives by virtue of the appointment is not a benefit fed (so to speak) out of property belonging to A., but is derived from that in which A. has no ownership, but only a power of appointment.[1]

302. Nor will a person be compelled to elect unless *his* property is attempted to be disposed of by the testator. Thus, where a testator assumed to dispose of the *whole* of a fund by virtue of a power in a settlement, and appointed a moiety thereof to C., and the other moiety to S., whose wife was in fact entitled to a moiety under the settlement, and S.'s wife subsequently died, and S. administered upon her estate, it was held that there was no case for an election, because the gift, under the will, was to him in his own right, and his claim adversely to the will was as the representative of his wife; in other words, *his* property was not attempted to be disposed of by the gift to C.[2]

303. The doctrine of election only obtains in those cases in which the twofold gift is made by the same instrument. If, therefore, a benefit is conferred by deed upon a person whose property the donor afterwards affects to dispose of by will, this is no case of election, because the donee is not called upon to attack and defend, at one breath, the same instrument.

Evidence *dehors* the instrument is not admissible.[3]

It is immaterial whether the testator knew that the property was not his own, or conceived it to be his own. The doctrine of election will exist in either case.[4] Cases of no little difficulty, however, sometimes arise where a testator assumes to deal with property in which he has but a limited interest. Where he has

[1] Bristow *v.* Warde, 2 Ves. Jr. 336; In re Fowler's Trust, 27 Beav. 362.

[2] Grissell *v.* Swinhoe, L. R., 7 Eq. 291. See Cooper *v.* Cooper, L. R., 6 Ch. 21, and Wilkinson *v.* Dent, Id. 339.

[3] Clementson *v.* Gandy, 1 Keen, 309; Stratton *v.* Best, 1 Ves. Jr. 285; Honywood *v.* Forster, 30 Beav. 14; City of Philadelphia *v.* Davis, 1 Whart. 490; Timberlake *v.* Parish, 5 Dana, 345; Miller *v.* Springer, 20 P. F. Sm. 273; McGinnis *v.* McGinnis, 1 Kelly, 496. See, however, Long *v.* Wier, 2 Rich. Eq. 283.

[4] Whistler *v.* Webster, 2 Ves. Jr. 367; Stephens *v.* Stephens, 1 De G. & J. 62.

any interest at all, the leaning of the courts is towards a construction which would make him deal only with that to which he is entitled, and not with that over which he had no disposing power, inasmuch as every testator must *primâ facie* be taken "to have intended to dispose only of what he had power to dispose of, and in order to raise a case of election, it must be clear that there was an intention on the part of the testator to dispose of what he had not the right or power to dispose of."[1] Moreover, it may be stated generally that the intention to raise an election must be a clear one; for a party will never be put to his election upon a doubtful construction.[2]

304. As to the manner in which an election may be made, it may be either by some decisive act by which the party may be at once estopped from afterwards setting up any title adverse to the disposition to which he has thus given effect,[3] or by some silent acquiescence in the changed condition of things upon the faith of which other parties have acted and acquired rights which it would be inequitable afterwards to disturb.[4] But a bare acquiescence, without a deliberate and intelligent choice made under a full knowledge of all the circumstances, and of the party's rights, will not be an election.[5]

If the fact of election is doubtful, it may be sent to a jury for determination.[6]

Parties competent to make an election must usually be *sui*

[1] Wintour *v.* Clifton, 8 De G., M. & G. 641; Shuttleworth *v.* Greaves, 4 My. & Cr. 35; Dummer *v.* Pitcher, 2 My. & Keen, 262; See Wilkinson *v.* Dent, L. R., 6 Ch. 339.

[2] Wilson *v.* Arny, 1 Dev. & Bat. Eq. 376; Hall *v.* Hall, 1 Bland, 130; McElfresh *v.* Schley, 2 Gill, 182; Havens *v.* Sackett, 15 N. Y. 365; Stokes's Estate, 11 P. F. Sm. 144. See, also, Blacket *v.* Lamb, 14 Beav. 482; where the court refused to raise an election from mere precatory words which, in that case, were construed not to be imperative.

[3] See Snell's Principles of Equity, 182.

[4] Tibbits *v.* Tibbits, 19 Ves. 956; Worthington *v.* Wiginton, 20 Beav. 67. See Spread *v.* Morgan, 11 H. L. Cas. 588; Fulton *v.* Moore, 1 Casey, 468; Upshaw *v.* Upshaw, 2 Hen. & Munf. 381; Caston *v.* Caston, 2 Rich. Eq. 1; Stark *v.* Hunton, Saxt. Ch. 216, 227; Clay *v.* Hart, 7 Dana, 1.

[5] Duncan *v.* Duncan, 2 Yeates, 302; Snelgrove *v.* Snelgrove, 4 Dessaus. 274; Anderson's Appeal, 12 Casey, 476; Dickinson *v.* Dickinson, 11 P. F. Sm. 405; Cox *v.* Rogers, 27 Id. 167; 1 Lead. Cas. Eq. 419 (Am. note).

[6] Roundel *v.* Currer, 2 Bro. C. C. 67; 1 Swanst. 383, n.

juris, but elections may sometimes be made by a court of equity on behalf of infants and married women.[1]

A party compelled to elect is entitled to know the value of the properties previous to election;[2] and may file a bill to have all necessary accounts taken.[3]

305. It was at one time doubted whether the consequences of an election, adverse to the will of the donor, were to be measured by the theory of forfeiture, or by that of compensation; that is to say, whether the gift was absolutely forfeited by the refractory donee for the benefit of the disappointed beneficiary, or whether the donee was only obliged to make good the other gift to the extent of its value.

The law is now settled in favor of the doctrine of compensation.[4]

306. It was said by Sir Wm. Grant, in Kidney *v.* Coussmaker,[5] that the doctrine of election did not apply in the case of a creditor. This *dictum* is true enough if confined only to those cases in which property is charged by will with debts; for in such a case the creditor may claim the benefit of the charge, and still seek satisfaction of his debt out of other assets. But the rule is, nevertheless, not of universal application; for it has been decided that where a creditor decisively acquiesces in a certain disposition of the debtor's property, he will not be allowed to enforce the collection of his debt by proceedings by which that disposition may be violated. Thus, if a creditor accepts a dividend under an assignment for the benefit of creditors, he will not afterwards be allowed to avoid that assignment in order to render the assets covered thereby liable to execution for his debt.[6]

[1] Davis *v.* Page, 9 Ves. 350; Barrow *v.* Barrow, 4 K. & J. 409; Willoughby *v.* Middleton, 2 J. & H. 344; Addison *v.* Bowie, 2 Bland, 606; Streatfield *v.* Streatfield, Cas. temp. Talbot, 176; 1 Lead. Cas. Eq. 333.

[2] Boynton *v.* Boynton, 1 Bro. C. C. 445; Buttricke *v.* Brodhurst, 3 Bro. C. C. 88; Kreiser's Appeal, 19 P. F. Sm. 200. See, however, Douglas *v.* Douglas, L. R., 12 Eq. 637.

[3] Buttricke *v.* Brodhurst, 3 Bro. C. C. 88; 1 Ves., Jr. 171.

[4] Spread *v.* Morgan, 11 H. L. Cas. 588; Key *v.* Griffin, 1 Rich. Eq. 67; Stump *v.* Findley, 2 Rawle, 174; Van Dyke's Appeal, 10 P. F. Sm. 490. See, also, Sandoe's Appeal, 15 Id. 314.

[5] 12 Ves. 136.

[6] Adlum *v.* Yard, 1 Rawle, 163; Perry on Trusts, § 596.

CHAPTER V.

CONVERSION AND RECONVERSION.

307. General nature and extent of equitable conversion.
308. Example. *Fletcher* v. *Ashburner*.
309 Conversion may take place either under a trust or under a contract.
310. What language is necessary to effect a conversion.
311. In what ways a trust to convert may be made imperative.
312. Question of conversion one of intention.
313. Contract, to work a conversion, must be binding.
314. General results of a conversion; qualifications.
315. Failure of the purposes of a conversion; resulting trust.
316. *Ackroyd* v. *Smithson*, *Smith* v. *Claxton*.
317. Conversion "out and out."
318. Doctrine in the United States on this subject.
319. Conversion under instruments *inter vivos*.
320. Time from which a conversion takes place.
321. Conversion under optional contracts.
322. Reconversion may be by act of party or by act of law.
323. Election to reconvert may be either by express declaration, or by acts.
324. By whom such election may be made.
325. Reconversion by operation of law.

307. By Equitable Conversion is meant a change of property from real into personal, or from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity. "Nothing," it has been said, "is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given, whether by will or by way of contract, marriage articles, settlement or otherwise; and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed, the owner of the fund, or the contracting

parties may make land-money or money-land."[1] By this and similar declarations, the judges do not mean to assert a solemn piece of legal juggling without any foundation of common sense; but simply to lay down the practical doctrine that for certain purposes of devolution and transfer, and in order that the rights of parties may be enforced and preserved, it is sometimes necessary to regard property as subject to the rules applicable to it in its changed and not in its original state, although the change may not have actually taken place.

308. The case just cited[2] is an excellent illustration of the general nature of this doctrine. There F. made his will, by which he devised real estate to trustees in trust (after his widow's death), to sell the same and divide the proceeds between his son and daughter. The son and daughter both died in the lifetime of the widow, who, as her son's next of kin, became entitled to the property if it were to be considered as personalty. After her death a bill was filed by the son's heir-at-law, claiming the property as real estate. It will be observed that the question then fairly arose whether the devolution of the property, after the death of the original testator, was to be governed by the rules which were applicable to it in its existing condition as realty, or by the rules which would control it in the condition into which it was directed to be changed—viz., personalty; in the former case it would go to the son's heir; in the latter, to

[1] By Sir Thomas Sewell, M. R., in Fletcher *v.* Ashburner, 1 Bro. C. C. 497. This is the leading authority on this subject, See 1 Lead. Cas. Eq. 619. See, also, Craig *v.* Leslie, 3 Wheat. 563; Peter *v.* Beverly, 10 Peters, 532; Taylor *v.* Benham, 5 How. 233; Holland *v.* Cruft, 3 Gray, 180; Lorillard *v.* Coster, 5 Paige Ch. 172; Arnold *v.* Gilbert, 5 Barb. 190; Kane *v.* Gott, 24 Wend. 641; Allison *v.* Wilson, 13 Serg. & R. 330; Morrow *v.* Brenizer, 2 Rawle, 185; Burr *v.* Sim, 1 Whart. 252; Parkinson's Appeal, 8 Casey, 455; Brolasky *v.* Gally's Ex'rs., 1 P. F. Smith, 509; McClure's Appeal, 22 Id. 417; Tazewell *v.* Smith, 1 Rand, 313; Pratt *v.* Taliaferro, 3 Leigh, 419; Smith *v.* McCrary, 3 Ired. Eq. 204; Ex parte McBee, 63 N. Carolina, 332; Tayloe *v.* Johnson, Id. 381; Scudder *v.* Vanarsdale, 2 Beas. 109; Thomas *v.* Wood, 1 Maryl. Ch. 296; Lynn *v.* Gephart, 27 Maryl. 563; Collins *v.* Champ's Heirs, 15 B. Mon. 118; Green *v.* Johnson 4 Bush, 167; Rinehart *v.* Harrison, Baldw. C. C. 177. A direction in the will postponing the time of sale will not prevent a conversion from taking place; High *v.* Worley, 33 Alab. 196; Hocker *v.* Gentry, 3 Metcalfe, (Ky.) 463.

[2] Fletcher *v.* Ashburner, *supra*.

the personal representative of the widow. The question was decided in favor of the personal representative of the widow, upon the theory (already quoted) stated by the Master of the Rolls.

309. Conversion may arise not only under a trust in a will (of which an illustration has just been given), but also under settlements and other instruments *inter vivos*. Where (for example) a binding contract is made for the sale of land, from that instant a conversion takes place.[1] The purchaser is regarded for many purposes as the owner of the land, and the rights of parties claiming under him are determined by the rules which govern the devolution of realty. If the purchaser dies before conveyance, his heir will take the land, and the executor will be obliged to pay the purchase-money.[2]

310. Bearing in mind the twofold manner (by trust and by contract) by which conversion may take place, the next points for consideration are, first, what language is necessary to effect a conversion; secondly, the general results of the conversion; and thirdly, the time from which the conversion takes place.[3]

As to the first point, it may be stated, in general terms, that in order to effect a conversion the direction to convert in a trust must be couched in imperative language, and that in a contract the agreement must be binding.

The general rule that the duty to convert must be imperative, and not left to the mere option of the executors or trustees, was established many years ago, and has been recognised and enforced in many cases both in England and in this country. One of the earliest authorities upon this subject is Curling *v.* May.[4] There A. gave 500*l.* to B., in trust that B. should lay out the same in the purchase of lands *or* put it out in good securities for the separate use of his daughter H. (the plaintiff's then wife), her heirs, executors and administrators. Subsequently, and before the money was invested, the daughter died, and her husband as administrator brought his bill for the money against

[1] Sugden, V. and P. 175.

[2] See Att. Gen. *v.* Brunning, 8 H. L. Cas. 243; Griffith *v.* Beecher, 10 Barb. 432; Rose *v.* Jessup, 7 Harris, (Pa.) 280; Naglee *v.* Ingersoll, 7 Barr, 185. The rights of the creditors of the vendor are not affected by the conversion. Leiper's Ex'rs *v.* Irvine, 2 Casey, 54. See Leiper's Appeal, 11 Casey, 420.

[3] See Snell's Principles of Equity, 140.

[4] Cited, 3 Atk. 255.

her heir. A decree was made in favor of the husband, on the ground that, under the alternative language used by the testator, it could not be gathered from the will that his principal intention was that the money should be turned into land. So, also, in an American case, a conveyance to trustees to pay an annuity out of the rents of certain real estate, *or* to sell, was held not to work a conversion, because it was not imperative on the trustees to exercise the power.[1] Many other authorities to the same effect are to be found.[2]

311. This imperative character may be impressed upon the trust in, at least, two well recognised ways: either, first, by the use of direct words of command, or, secondly, by a disposition of the property on such limitations as necessitate a change.

If a testator devises land to be sold, or orders or directs that the same shall be sold, it is obvious that it is the imperative duty of the trustees to make the sale. They have no discretion in the matter. They are simply to turn the real estate into personalty, and to apply the money thus realized to the purpose designated in the will. This is the plainest case of conversion.

Another case, almost as plain, is where the testator has not imperatively ordered a sale, but has given a power to convert coupled with such directions as to the ulterior settlement of the property in its changed condition, as to render it impossible to carry out the will without making the conversion. Thus, if a man were to give a power to trustees to invest money in land, and were to prescribe such subsequent limitations as could only be carried out if the subject-matter were realty, a conversion must necessarily be intended, otherwise the limitations would fail.[3]

[1] Bleight *v.* The Bank, 10 Barr, 131.

[2] See Curling *v.* May, cited 3 Atk. 255; In re Ibbitson, L. R., 7 Eq. 226; Bourne *v.* Bourne, 2 Hare, 35; De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 548; Greenway *v.* Greenway, 2 De G., F. & J. 128; Dominick *v.* Michael, 4 Sandf. S. C. 374; Pratt *v.* Taliaferro, 3 Leigh, 419; Montgomery *v.* Milliken, 1 Sm. & M. Ch. 495; Cook *v.* Cook, 5 C. E. Green, 375; Anewalt's App., 6 Wr. (Pa.) 414; Chew *v.* Nicklin, 9 Id. 84; Miller's & Bowman's App., 10 P. F. Sm. 404; Perot's App., 102 Pa. St. 235. But the fact that one of the beneficiaries may be given an option to take the property in its unconverted state, does not prevent a conversion. See Laird's App., 4 Norris, 343; Pyle's App., 102 Pa. St. 317; and Miller *v.* Commonwealth, 111 Pa. St. 321.

[3] Earlom *v.* Saunders, Ambler, 241. See Atwell *v.* Atwell, L. R., 13 Eq. 23; also the opinion of Lord Cottenham, in Cookson *v.* Cookson, 12 Cl. & Fin. 145.

312. The doctrine of conversion is not confined to those testamentary dispositions only in which imperative words are used, or wherein limitations, which can only be effectuated by a conversion exist. It is to be applied to all those cases, in which a general intention of the testator is sufficiently manifested, to give the property to the donee in a condition different from that in which it exists at the time when the will goes into effect.[1] A mere testamentary power of sale, vested in executors to sell real estate, will not work a conversion. There must be an *intent* to convert, either express or implied.[2] The question always is, did the testator intend to give money or to give land, and has that intention been sufficiently expressed? Once arrive at the intention, by proper rules of interpretation, and the property will then be considered as impressed with that character which the testator designed it should bear when it reached the hands of the beneficiary.[3] While a discretion in the trustees, as to whether a sale shall or shall not take place, will of course prevent a conversion, yet a mere discretion as to the *time* or manner of sale will not hinder a conversion.[4]

313. As, where the conversion arises under a trust, imperative words (or equivalent provisions) are required to create it; so, also, where the conversion is claimed to have taken place by virtue of a *contract*, it is necessary, as a general rule, that the contract be binding. The question always is, whether the vendor or purchaser (as the case might be) at the time of his death was either absolutely or contingently under such an agreement as equity would enforce against him.[5] The rule is not

[1] See Snell's Principles of Equity, 142; Bogert *v.* Hertell, 4 Hill, 492; Tazewell *v.* Smith, 1 Randolph, 313; Stagg *v.* Jackson, 1 Comstock, 206; Phelps *v.* Pond, 23 N. Y. 69; Cowley *v.* Hartstonge, 1 Dow. 361; Cookson *v.* Reay, 5 Beav. 22; 12 Cl. & Fin. 121; Grieveson *v.* Kirsopp, 2 Keen, 653; Cornick *v.* Pearce, 7 Hare, 477; Mower *v.* Orr, Id. 473; Greenway *v.* Greenway, 1 Giff. 131; Roland *v.* Miller, 100 Pa. St. 47. It is the *duty* to convert which creates the equitable change: Thornton *v.* Hawley, 10 Ves. 129; Taylor *v.* Taylor, 3 De G., M. & G. 190; Robinson *v.* Governors, 10 Hare, 19.

[2] Hunt's Appeal, 105 Pa. St. 128.

[3] Morrow *v.* Brenizer, 2 Rawle, 185; Wurtz *v.* Page, 4 C. E. Green, 365. But see Girard Life Ins. Co.'s App. (Page's Estate), 25 P. F. Sm. 87.

[4] Stagg *v.* Jackson, 1 Comst. 206; Tazewell *v.* Smith, 1 Rand. 313. But see Christler *v.* Meddis, 6 B. Mon. 35.

[5] Dart on Vendors, 238 (4th ed.); Garnett *v.* Acton, 28 Beav. 333; 1 Lead. Cas. Eq. 843; note to Fletcher *v.* Ashburner. See, however, the case of Frayne *v.* Taylor, 33 L. J. Ch. (N. S.) 228, where an heir of a vendor

altered by anything happening after the death of the purchaser by which the binding character of the contract could be affected,[1] nor by the circumstance that the purchase is entirely at the option of the vendee.[2]

314. The next subject for consideration is the general effects or results of the conversion. Generally speaking, the court carries out the principle of conversion in all its consequences.[3] Thus money directed to be turned into land descends to the heir; and land directed to be converted into money goes to personal representatives;[4] money belonging to a married woman which is directed to be converted into land is liable to the husband's curtesy;[5] an alien, though incapable of taking land for his own benefit, can take the proceeds of land directed to be sold;[6] and in many other cases the enjoyment of property will be determined by the rules applicable to it in its changed, and not in its original state.[7]

But it must not be supposed that for *all* purposes the property is to be treated as in its converted state. The notional conversion is not equivalent to a real conversion. Thus in Franks *v.* Bollans[8] it was held that where there was a notional conversion

elected to carry out the parol contract of his ancestor, and it was held that a conversion had taken place, and that the proceeds should go to the personal estate of the ancestor.

[1] Dart. Vend. 246; 1 L. Ca. Eq. 843; Hudson *v.* Cook, L. R., 13 Eq. 417.

[2] Dart on Vendors, 230; Collingwood *v.* Row, 3 Jur. N. S. 735; Kerr *v.* Day, 2 Harris, (Penna.) 114; D'Arras *v.* Keyser, 2 Casey, 249; Lawes *v.* Bennet, 1 Cox, 167.

[3] 2 Spence Eq. 264.

[4] Snell's Principles of Equity, 148; Scudamore *v.* Scudamore, Prec. Ch. 543; Ashby *v.* Palmer, 1 Mer. 296; Elliott *v.* Fisher, 12 Sim. 505; Wurts *v.* Page, 4 C. E. Green, 365; though see Girard Life Ins. Co.'s Appeal (Page's Estate), 25 P. F. Sm. 87.

[5] Sweetapple *v.* Bindon, 2 Vern. 536.

[6] Craig *v.* Leslie, 3 Wheat. 563; Du Hourmelin *v.* Sheldon, 1 Beav. 79; 4 My. & Cr. 525.

[7] See Earlom *v.* Saunders, Ambl. 241.

[8] L. R., 3 Ch. 718. In Oldham *v.* Hughes, 2 Atkyn, 452, Lord Hardwicke, in speaking of the power of a *feme covert* to bind money, articled to be laid out in land, by her consent in court, with the same effect as she could the land itself by a fine at law, remarked that "at law money so articled to be laid out in land is considered barely as money until an actual investiture, and the equity of this court alone views it in the light of a real estate; and, therefore, this court can act upon its own creature, and do what a fine at common law can upon land;" which shows that the doctrine of conversion in equity is purely notional, and that the property is to be treated, as if in its changed condition, only for certain

of realty into personalty, the husband of a woman beneficially entitled could not dispose of his wife's interest by the same means by which he could dispose of her actual personal property; and in Brook *v.* Badley[1] it was held that the interest of a person entitled to a portion of the proceeds of land directed to be sold was to be considered as realty, so far as his capacity to make a valid gift to a charity was concerned. "The estate," said Cairns, L. J., in the case last cited, "is in the hands of the trustees, not for the benefit of those trustees, but for the benefit of the four persons between whom the proceeds of the estate are to be divided when the sale takes place. It may very well be that no one of these four persons could insist upon entering on the land, or taking the land, or enjoying the land *quâ* land; and it may very well be that the only method for each one of them to make his enjoyment of the land productive, is by coming to the court and applying to have the sale carried into execution; but, nevertheless, the interest of each one of them is, in my opinion, an interest in the land, and it would be right to say in equity that the land does not belong to the trustees, but to the four persons between whom the proceeds are to be divided."[2]

So, also, in Foster's Appeal,[3] where the question was as to the extent to which partnership real estate had been converted,[4] it was said: "Conversion is altogether a doctrine of equity; in law it has no being; it is admitted only for the accomplishment of equitable results. *It follows, of necessity, that it is limited to its end.*"

315. Another very important qualification of the general effect of a conversion is that the conversion is limited to the purpose of the donor; and that, therefore, in the event of a failure of the purpose, the property will devolve according to its original character.[5]

When the purpose of the conversion totally fails, the rule is

purposes. See, however, Siter *v.* McClanachen, 2 Grat. 280.

[1] L. R., 3 Ch. 674. See, also, De Lancey *v.* Reg., L. R., 7 Ex. 140.

[2] Brook *v.* Badley, L. R., 3 Ch. 674.

[3] 24 P. F. Sm. 397.

[4] *Post*, § 512.

[5] See Hill on Trustees, 127, 128, and notes; Smith *v.* McCrary, 3 Ired. Eq. 204; Commonwealth *v.* Martin, 5 Munf. 117; Morrow *v.* Brenizer, 2 Rawle, 185; Slocum *v.* Slocum, 4 Edw. Ch. 613; Rizer *v.* Perry, 58 Md. 112.

quite simple. Where a conversion is directed or contracted, whether by will or by settlement, or other instrument *inter vivos*, whether of money into land, or of land into money, if the objects and purposes of that conversion have totally failed before the instrument directing the conversion comes into operation, no conversion will take place; but the property so directed, or contracted, to be converted will remain in its original state, or rather, will result to the testator or settlor with its original form unchanged.[1] Vice-Chancellor Wood, in speaking of the conveyance in Clarke *v.* Franklin,[2] said: "So here, if, at the moment when the grantor put his hand to this deed, the purpose for which conversion was directed had failed—for instance, if he had given all the proceeds instead of a part to charitable purposes, so that the property would have been *at home* in his lifetime—the court would have regarded it as if no conversion had been directed, and the property would have resulted to the grantor as real estate."

Turning now to cases of a *partial* failure of the objects of the conversion, the questions become, perhaps, a little more difficult and complicated. Taking into consideration, in the first place, conversion by wills, the general rule as to the case of land converted into personalty would seem to be, that where there is a partial failure, the undisposed of surplus will result to the *heir*, and, moreover, that where it is necessary to sell the land for the purposes of the trust, the surplus belongs to the heir as *money*, and not as land, and will, therefore, go to his personal representatives, even though the land may not have been sold during his lifetime.[3]

316. The leading authority upon the general proposition, that where there is a partial failure there will be a resulting trust for the *heir* and not for the *personal representatives* of the testator, is Ackroyd *v.* Smithson, well known for the celebrated argument

[1] Snell's Principles of Equity, 149.

[2] 4 K. & J. 257. See, also, Smith *v.* Claxton, 4 Mad. 492. Evans's Appeal, 13 P. F. Sm. 183, seems to be at variance with this ruling, but it was followed in Davis's Appeal, 2 Norris, 348.

[3] Ackroyd *v.* Smithson, 1 Bro. C. C. 503; Smith *v.* Claxton, 4 Mad. 492; Wright *v.* Wright, 16 Ves. 188; Wall *v.* Colshead, 2 De G. & J. 683; Snell's Prin. of Eq. 153; Lindsay *v.* Pleasants, 4 Ired. Eq. 320; Wood *v.* Cone, 7 Paige Ch. 471; North *v.* Valk, Dudley's Eq. 212; Wright *v.* Trustees of Meth. Epis. Church, Hoffman, 202

of Lord Eldon, then Mr. Scott, who was counsel in the case;[1] while the *character* in which the property goes to the heir is well explained in Smith *v.* Claxton.[2]

"Where a devisor," it was there said "directs his land to be sold, and the produce divided between A. and B., the obvious purpose of the testator is that there shall be a sale for the convenience of division, and A. and B. take their several interests as money and not land. So if A. dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the devisor that there shall be a sale for the convenience of division still applies, and the heir will take the share of A., as A. would have taken it, as money and not land. But suppose A. and B. both to die in the lifetime of the devisor, and the whole interest in the land descends to the heir; the question would then be whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the devisor being that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devise wholly failed, and the heir would, therefore, take the whole interest as land."

Passing now to the case of money directed to be laid out in land, the rule is that (following Ackroyd *v.* Smithson) the surplus occasioned by a partial failure will result to the personal representatives of the testator,[3] but that (departing from Smith *v.* Claxton) the personal representatives will take it in its original form of personalty, and not in its converted form of realty.[4]

[1] 1 Bro. C. C. 503; 1 Lead. Cas. Eq. 872. The rule in Ackroyd *v.* Smithson would seem not to be applicable to cases in which sales are made by order of court. In Steed *v.* Preece, L. R., 18 Eq. 197, land had been sold to raise an infant's costs in a suit for partition, and it was held that the personal representative was entitled to the surplus as against the remainder-man. See the remarks of Jessel, M. R., in that case. But a different conclusion was reached by Lord Romilly in Cooke *v.* Dealey, 22 Beav. 196; and see the note to Fletcher *v.* Ashburner, 1 Lead. Cas. Eq. 864 (4th Eng. ed.). The decision in Steed *v.* Preece would, however, appear to be based upon the sounder view.

[2] 4 Mad. 492. See, also, Newby *v.* Skinner, 1 Dev. & Bat. Eq. 488; Bagster *v.* Fackerell, 26 Beav. 469; Wall *v.* Colshead, 2 De G., & J. 683.

[3] Cogan *v.* Stephens, 1 Beav. 482, n.

[4] Reynolds *v.* Godlee, Johns. 536, 583; Hawley *v.* James, 5 Paige Ch. 318.

The reason for applying the principle of Ackroyd *v.* Smithson to the cases of conversion from personalty into realty is obvious; by so doing uniformity in the law is secured, and no just ground for making any distinction exists.[1] The reason for refusing to apply the rule in Smith *v.* Claxton to the case of a conversion from personalty into realty, is simply because, as the surplus goes to the executor, it *must* go as personalty; for "whatever he gets in *quâ* executor he must hold as personalty."[2]

317. In England the tendency which exists to favor the heir, has led the courts to draw a distinction between those cases in which there has been an intention to convert "out and out" (as it is termed), and those in which there is an intention to convert only for the purposes of the will; in the former case the heir will be excluded, in the latter he will take. The rule upon this subject has been stated to be "that unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personalty for the *purposes of the will*, but further, that the produce of the real estate shall be taken as personalty, whether such purposes take effect or not, so much of the real estate or produce thereof, as is not effectually disposed of by the will at the time of the testator's death (whether from the silence or inefficiency of the will itself, or from subsequent lapse), will result to the heir. But every conversion, however absolute in its terms, will be deemed a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin."[3] To such an extent has this doctrine been carried in England, that in Fitch *v.* Weber it was held, that the right of the heir was not defeated by an express declaration in the will, that

[1] See remarks of Lord Cottenham, when Master of the Rolls, in Cogan *v.* Stephens, 1 Beav. 482. n.

[2] Reynolds *v.* Godlee, Johns. 536, 583, per Vice Chancellor Wood.

[3] Mr. Cox's note to Cruse *v.* Barley, 3 P. Wms. 22; 1 Jarm. on Wills, 530; Amphlett *v.* Parke, 2 Russ. & My. 221; Taylor *v.* Taylor, 3 De G., M. & G. 190; Robinson *v.* The Governors, 10 Hare, 19; Barrs *v.* Fewkes, 2 Hem. & M. 60; and on rehearing, 11 Jur, N. S. 669; Nagle's Appeal, 1 Harris, (Pa.). 260, 264; Bedford *v.* Bedford, 35 Beav. 584; note to Ackroyd *v.* Smithson, 1 Lead. Cas. Eq. 889.

the fund should be considered a *personal* fund, and should in no case lapse or result for his benefit.[1]

318. In the United States the rule under consideration has not received a construction so favorable to the heir. In Craig *v.* Leslie, it was said to be settled, "that, if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold the quality of personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir-at-law to a resulting trust is defeated, and the estate is considered to be personal."[2] It was accordingly held that the blending of the proceeds of the realty with the personalty, so as to form a common fund, for all the purposes of the will, though it should happen that some of them fail, will render the conversion absolute.[3]

319. Having considered the cases of the failure of the purposes of a conversion in *wills*, it will be proper to say a few words upon the same subject in cases under settlements or other instruments *inter vivos*. In such cases the rule is the same whether land is to be converted into money or money into land;[4] the surplus results always to the settlor in its converted, not in its original form.[5] The reason of the distinction, in this respect, between conversions under wills and those under conveyances *inter vivos*, is because in the latter cases the instrument takes effect upon its delivery, and therefore the deed operates simply as a declaration on the part of the settlor, "from the time I put my hand to this deed, I limit so much of this property to myself as personal property."[6]

320. Having noticed the general effects and purposes of a conversion, the next subject for consideration is the *time* as from which the conversion is supposed to take place.

The general rule is that in the case of a will, the conversion takes place from the death of the testator;[7] in the case of a deed, it takes place from the date of the delivery of the deed.

[1] 6 Hare, 145. See De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 524, for an illustration of the extent to which the heir is favored in England.

[2] 3 Wheat. 563.

[3] Id. See, also, Burr *v.* Sim, 1 Whart. 252; Morrow *v.* Brenizer, 2 Rawle, 185.

[4] Snell's Principles of Equity, 157.

[5] Clarke *v.* Franklin, 4 K. & J. 263

[6] Id.

[7] Beauclerk *v.* Mead, 2 Atk. 167.

This rule, so far as it concerns deeds, is well illustrated by the case of Clarke *v.* Franklin.[1] There the trust was (after the determination of the life estate of the settlor) to sell certain real estate, and apply the proceeds first to making payments to certain persons who should then be living, and the residue to a charity. The charitable gift was void, and the question was whether the residue resulted to the heir or the next of kin of the settlor; and this depended, of course, upon the time as from which the conversion was to be considered as taking place. If the conversion took place immediately upon the delivery of the deed of settlement, then the residue would result to the settlor at once as personalty, and would on his death go to his next of kin; but if, on the other hand, the conversion did not take place until the time when the sale was (by the terms of the trust) to take place, viz., after the settlor's death, then in the *interim* the property continued to be real estate, and descended as such to the heir of the settlor. Vice-Chancellor Wood decided in favor of the personal representatives of the settlor; or, in other words, that the conversion had taken place as of the date of the delivery of the deed.

But this rule does not apply to the case of a mortgage with a power of sale; for the intention of the mortgagor cannot be presumed to be to work an immediate conversion, but only to raise money. Where, therefore, the mortgaged estate was sold, after the death of the mortgagor, it was held that the surplus, after paying the mortgage-debt, went to the heir of the mortgagor, because the equity of redemption had descended to him.[2]

321. It has been already observed that a contract of sale, which is binding on the vendor, will work a conversion, although the purchase is at the option of the vendee.[3] When the option is exercised the conversion takes place, and it will then relate back to the date of the contract, and the property will be considered as converted from that time.[4] If the option is exercised after the death of the vendor, and he has made no specific devise of the property, the purchase-money will go to his personal representatives generally; but if he has specifically, and in express

[1] 4 K. & J. 257.
[2] Wright *v.* Rose, 2 Sim. & St. 323.
[3] *Ante*, § 313.
[4] Lawes *v.* Bennet, 1 Cox, 167.

terms, devised the land upon certain limitations, the purchase-money will go in accordance with those limitations.[1] If, however, a testator makes a specific devise, and after the execution of his will enters into a contract of sale at the option of the purchaser, the inference is that the testator meant his property to go according to the state to which it would be reduced by the exercise of that option, and the specific devisee will not take.[2]

Until the option to purchase is exercised, the intermediate rents will go to the persons who were entitled to the property up to that time as real estate.[3]

322. The last topic which requires notice under the head of Conversion is that of Reconversion, which has been defined to be "that notional or imaginary process by which a prior constructive conversion is annulled and taken away, and the converted property restored in contemplation of equity to its original actual quality."[4] In other words, a reconversion is where the direction to convert is countermanded by the parties entitled to the property, or by act of law.

And, first, the reconversion may take place by act of the party, or by election as it is termed. The simplest case is where there is a trust to sell and pay the entire proceeds of the sale to A. Here A. has a right to say that he prefers to take the property in its original instead of its converted state; in other words, he elects to take the land.

323. This election may take place either by express declaration, or by some act indicating a preference to enjoy the land in its actual state.[5] The, act, however, must be clear and unequivocal, and of such a character as to leave no reasonable doubt of the intent.[6] No inference, for example, can be drawn from mere lapse of time.[7] Nor can a reconversion take place as a general rule, unless all the parties in interest unite to elect; for where several persons have an interest in the proceeds of a

[1] See Drant *v.* Vause, 1 Y. & C. C. C. 580; Collingwood *v.* Row, 3 Jur. N. S. 735; Snell's Eq. 146.

[2] Weeding *v.* Weeding, 1 J. & H. 424.

[3] Townley *v.* Bedwell, 14 Ves. 591; Ex parte Hardy, 30 Beav. 206.

[4] Snell's Principles of Equity, 160.

[5] Davies *v.* Ashford, 15 Sim. 42; Mutlow *v.* Bigg, L. R., 1 Ch. D. 393; Bailey *v.* Allegheny Nat. Bank, 104 Pa. St. 425.

[6] Beatty *v.* Byers, 6 Harris, (Pa.) 105.

[7] Beatty *v.* Byers, *supra*. The rule is the same when the power to elect is express. The express power confers only what the law without it would impliedly give. Jones *v.* Caldwell, 97 Pa. St. 442.

sale, it does not lie in the power of any one of them to disappoint the others by preventing the sale from taking place.[1] Where, however, there was a direction to lay out a certain sum of money in land, to be equally divided between A., B. and C., and A. died leaving an infant heir, and B. and C. together with the infant heir filed a bill for the money, it was held (although an infant cannot elect) that B. and C. were entitled to take their shares (two-thirds) in money.[2]

324. A remainder-man cannot elect so as to affect the interests of owners of prior estates.[3] A lunatic cannot elect;[4] nor can an infant ordinarily,[5] but may do so when it is found to be so for his benefit.[6]

Married women were in England formerly only able to effect a reconversion either by means of the pious fraud of a sham purchase of real estate, and a subsequent levying of a fine, or by coming into court, and there giving their consent to take the money as personal estate.[7] The inconvenience attending these methods of effecting a reconversion finally led to the passage of a statute by which a married woman was permitted, by deed executed in compliance with its provisions, to make her election to take or dispose of money to be laid out in land.[8]

325. Reconversion sometimes takes place by operation of law. This occurs when a fund directed or covenanted to be laid out in real estate comes into the hands of the person for whose benefit the purchase is to be made, and in whom the entire right is vested, and he dies without making any declaration of his intention. The fund is then said to be "at home," and "being in the hands of one without any other use, but for himself, it will be money, and the heir cannot claim." Chichester *v.* Bicker-

[1] Holloway *v.* Radcliffe, 23 Beav. 163; Willing *v.* Peters, 7 Barr, 290; Beatty *v.* Byers, 6 Harris, 105.

[2] Seeley *v.* Jago, 1 P. Wms. 389.

[3] 2 Spence Eq. 271; Crabtree *v.* Bramble, 3 Atk. 686; Cookson *v.* Cookson, 12 Cl. & Fin. 146; Snell's Prin. of Eq. 162.

[4] Ashby *v.* Palmer, 1 Mer. 296.

[5] Seeley *v.* Jago, 1 P. Wms. 389; Robinson *v.* Robinson, 19 Beav. 494.

[6] Robinson *v.* Robinson, *ut sup.*

[7] Oldham *v.* Hughes, 2 Atk. 452.

[8] 3 & 4 Will. IV., c. 74, s. 77; Forbes *v.* Adams, 9 Sim. 462; Snell's Eq. 163, 164.

[9] Per Lord Thurlow in Pulteney *v.* Darlington, 1 Bro. Ch. C. 223; 7 Bro. P. C. 530; Rich *v.* Whitfield, L. R., 2 Eq. 583; note to Fletcher *v.* Ashburner, 1 Lead. Cas. Eq. 838.

stoff[1] is a case which illustrates the doctrine of reconversion by operation of law. In that case Sir John Chichester, on his marriage with the daughter of Sir Charles Bickerstaff, covenanted to advance 1500*l.* within three years to be laid out in land of which the ultimate limitation was to his right heirs. Within a year after the marriage, the wife died childless, and Sir John died three days after his wife. By his will he made Bickerstaff his executor, and his sister, Francis Chichester, his residuary legatee. His heir-at-law then filed a bill against Bickerstaff, claiming that as the 1500*l.* was to have been laid out in land, it ought to go to him under the limitations in the settlement. But Lord Somers said that the money, though once bound by the articles, when the wife died without issue became free again; in other words, that it was then to be considered as *at home* in Sir John's hands. The bill was therefore dismissed.

[1] 2 Vern. 295.

CHAPTER VI.

ADJUSTMENT.

326. Equities to be considered under Adjustment; Set-off, Contribution, Exoneration, Subrogation, and Marshalling.
327. Set-off.
328. Contribution; application most frequent in case of sureties.
329. No contribution originally enforceable at law; advantages of equitable proceeding.
330. General rules as to right of contribution.
331. Exoneration; not originally enforceable at law.
332. Cases in which these equities are usually applied.
333. Sales of different parcels of mortgaged land to successive purchasers.
334. General average.
335. Subrogation; nature of the right.
336. Judgment may be kept alive after it is paid, in order to protect equities.
337. Extent of the doctrine of subrogation.
338. Qualifications.
339. Surety can compel a creditor to make a prompt use of his remedies.
340. Marshalling.
341. Usually enforced through the medium of subrogation.
342. How the equity of marshalling is sometimes qualified.
343. Its application in cases of bankruptcy.
344. Cases in which this equity is usually applied in the United States; doctrine of *Fosdick* v. *Schall*.
345. Marshalling as applied to estates of decedents.
346. Order in which assets of a decedent are applied to the payment of his debts.
347. How the general personalty may be exonerated.
348. Exoneration by implication.
349. When realty and personalty contribute *pro rata*.
350. Assets will not be marshalled in favor of a charity.

326. The equities which may be classed under the general head of Adjustment, are those which are applied mainly to the determination of the rights and liabilities which grow out of the relation of debtor and creditor, although they are also applicable to those which arise out of various other relations. Taking the position of debtor and creditor as a type, it is plain that the rights and liabilities arising therefrom may exist either between the debtor and creditor simply; or between debtors *inter sese;* or between debtors of a certain class on the one hand, and their

co-debtors and the creditor on the other; or, finally, between creditors of a certain class on the one hand, and their co-creditors and the debtor, and volunteers claiming under them, on the other; and that these rights and liabilities may thus be of a greater or less complicated character, and be affected by few or many considerations.

From these different positions which parties may thus occupy towards each other, spring the different equities of Set-off, Contribution, Exoneration, Subrogation and Marshalling.

They may all be conveniently classed under the general head of Adjustment of Liabilities; for they all depend upon the application of certain general maxims which tend to throw burdens upon those who should justly bear them, but only in their due proportion and in their proper order, and to secure benefits to those who are of right entitled thereto, consistently with, and with just regard to, the rights of others. The maxims referred to are such as express the general principles of law and equity, that he who reaps the benefit should also incur the burden, that equality is equity, and the like; and they all look to the orderly and equitable enforcement of liabilities against the parties by whom, and in favor of those to whom, they are justly due.

327. The right of set-off, although it did not originally exist at common law, was, nevertheless, so effectually introduced by statute, that it now, perhaps, furnishes no ground for interference by a chancellor as an *equitable right*.[1] It is, indeed, largely applied in equity in bills for an account; but that is, as will be seen, an *equitable remedy* which depends for its existence and exercise, not upon the refusal of courts of law to recognise a right, but from their inability, conveniently and properly, to administer it. Some claims, also, could be set off in equity

[1] For an account of the principles upon which equity originally allowed the right of set-off, and the manner in which the necessity for the exercise of its jurisdiction came to be superseded by statute, see Ex parte Stephens, 11 Ves. 27; Green *v.* Farmer, 4 Burr. 2220, 2221; Freeman *v.* Lomas, 9 Hare, 116. See, also, Duncan *v.* Lyon, 3 Johns. Ch. R. 358; Dale *v.* Cooke, 4 Id. 11; Simpson *v.* Hart, 1 Id. 94, Brown *v.* Hendrickson, 16 Am. Law Reg. N. S. 619; Howe *v.* Sheppard, 2 Sumn. 133; Greene *v.* Darling, 5 Mason, 207; Gordon *v.* Lewis, 2 Sumn. 628; Blake *v.* Langdon, 19 Verm. 485; Story's Eq., § 1430 *et seq.*

which might not have been allowed at law, as, for example, a debt which had been assigned, and which (being a *chose in action*, and, therefore, not assignable at law) could be, in equity alone, treated as belonging to the assignee, and, therefore, in equity alone could be made available as a set-off.[1] But it is obvious, that cases such as these depend upon certain equitable titles or equitable rights, already noticed; and that the enforcement of the right of set-off in bills for an account is referrible to the equitable remedy, and will be considered under that head.

[1] See Haynes's Outlines of Equity, 158. Perhaps no clearer or more succinct statement of the origin of the doctrine of set-off can be found, than that contained in this little treatise, and it may be here quoted with advantage. "By the civil law," says Haynes, "if A. was indebted to B., and before he discharged his liability, B. became indebted to him, what was called 'compensation' took place, that is to say, A.'s liability to B. became *ipso facto* extinguished partially or wholly according to the amount of B.'s liability to him. This doctrine of compensation was founded on a principle of natural equity or good sense, which forbids that a man should be compelled to pay one moment what he will be entitled to recover back the next; or, to use the words of the civil law, 'Ideo compensatio necessaria est quia interest nostrâ potius non solvere quam solutum repetere.' Now the common law utterly refused to recognise this principle of justice. If B. owed A. money and A. owed B. money, A. was entitled to recover from B., although the amount of his debt was greater, and although he might himself be in insolvent circumstances, and thus by being first in the case he might obtain judgment and payment of the amount recovered, leaving B. to sue subsequently for his own debt, and recover a judgment of his own bearing no fruits. Nay, even if A. had actually become bankrupt, so that his assignees had become entitled to what was owing from B., the law allowed A.'s assignees to recover from B. the whole amount, leaving B. to go in under the bankruptcy and prove against A.'s estate, and recover a dividend only. The glaring injustice of these results in cases of bankruptcy led to the first legislative mitigation, viz., that effected in Anne's reign, of allowing a set-off in cases of mutual credits and mutual debts between the bankrupt and any person. About a quarter of a century later, by a short and unobtrusive section in an act which is entitled 'An Act for the relief of debtors, with respect to the imprisonment of their persons' (2 Geo. II., c. 22, § 13), a most important alteration was effected in the law, by enacting that in cases of mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set off against the other. And it is under this enactment, made perpetual and extended by a subsequent act (8 Geo. II., c. 24, §§ 4, 5), that the right of set-off still exists at law." Haynes's Outlines of Equity, 153, 154. See, also, notes to Rose *v.* Hart, 2 Sm Lead. Cas. 293

Nevertheless, these remarks must be taken with some qualification. Cases do arise, even under the modern common-law and statutory liberality as to set-off, in which a set-off at law is not admissible. Thus, it has been held that where the right of the defendant is simply to call the plaintiff to an account, and his demand is such as must be settled in account render or by bill in equity, a set-off in an action at law cannot be allowed.[1] In these cases, and possibly some others, the remedy, if any exists, must be by bill in equity.[2]

328. The equities to be considered at present are those of Contribution, Exoneration, Subrogation and Marshalling.

The equity for Contribution arises when one of several parties who are liable to a common debt or obligation discharges the same for the benefit of all. It is founded not on contract, but on the general principles of justice stated above.[3] But it cannot be enforced on any ground of fraud; that is to say, when a fraud is attempted to be practiced on several persons, and one, alone, suffers damage, the injured party has no right to call upon the others, against whom the deceit was designed to be practiced, for contribution.[4] The application of this equity is seen most frequently in the case of sureties; but it will, of course, be borne in mind, that the rules stated in regard to this particular class of debtors are, in general, true as to all parties who are liable in common to a debt or charge of any kind.

Where there are two or more sureties, and one pays the debt for which all are bound, the surety who pays has right to

[1] Russell *v.* Miller, 4 P. F. Sm. 154.

[2] See further on this subject, and as examples of cases in which a set-off may be enforced in equity which could not be allowed at law, Gay *v.* Gay, 10 Paige, 369; Ferris *v.* Burton, 1 Vt. 439; Foot *v.* Ketchum, 15 Id. 258; Lee *v.* Lee, 31 Ga. 26; Lindsay *v.* Jackson, 2 Paige, 581; Ainslie *v.* Boynton, 2 Barb. 258; Jeffries *v.* Evans, 6 B. Mon. 119.

[3] Dering *v.* Earl of Winchelsea, 1 Cox, 318; 1 Lead. Cas. Eq. 100; Whiting *v.* Burke, L. R., 10 Eq. 539; 6 Ch. 342; Yonge *v.* Reynell, 9 Hare, 809; Stirling *v.* Forrester, 3 Bligh, 575; McMahon *v.* Fawcett, 2 Rand. 514; Moore *v.* Moore, 4 Hawks, 358, 360; Moore *v.* Isley, 2 Dev. & Bat. Eq. 372; Allen *v.* Wood, 3 Ired. Eq. 386; Screven *v.* Joyner, 1 Hill Eq. 252; McKenna *v.* George, 2 Rich. Eq. 15; Breckinridge *v.* Taylor, 5 Dana, 110; Mills *v.* Hyde, 19 Vt. 59; Strong *v.* Mitchell, Id. 644; Craig *v.* Ankeney, 4 Gill, 225; Campbell *v.* Mesier, 4 Johns. Ch. 334; 6 Id. 21; Van Winkle *v.* Johnson, 11 Oregon, 469.

[4] Grubb *v.* Cottrell, 12 P. F. Sm. 23 See, also, Peck *v.* Ellis, 2 Johns. Ch. R. 136.

[5] As an illustration of the cases in which this equity arises and of the necessity for relief by bill in equity, see Fulton's Appeal, 95 Pa. St. 323.

recover from each of his co-sureties his proportionate share of the common burden; in other words, he has the right to enforce contribution. This right may be asserted through the medium of a bill in equity.

329. No contribution could have been enforced at common law, and the relief given in equity was consequently based upon the general principle that no redress could be had elsewhere.[1] Subsequently, however, the common-law courts began to administer relief by virtue of an implied assumpsit, and the remedy thus established has been applied, especially in this country, to most cases of contribution.[2] Nevertheless, the remedy in equity is, in many respects, superior. At law separate actions would have to be brought against each co-surety; whereas, in equity, all of the co-sureties could be made liable in the same bill, and the rights of sureties as against the principal could be adjusted in the same action.[3] Hence, it has been held that the complexity of an agreement, and the multiplicity of suits and the successive sets of suits to which it might give rise at law, are grounds upon which a court of chancery might properly entertain a bill for the adjustment of the contributions, called for by the agreement, in one suit.[4] At law the co-surety was compellable only to contribute his *pro rata* proportion, having regard to the whole number of sureties, without reference to the fact that some one or more of them might be insolvent;[5] whereas

[1] Note to Dering *v.* Earl of Winchelsea, 1 Lead. Cas. Eq. 100; Harris *v.* Ferguson, 2 Bailey, 397; Norton *v.* Coons, 3 Denio, 130.

[2] Johnson *v.* Johnson, 11 Mass. 359; Bezzell *v.* White, 13 Alab. 422; Fletcher *v.* Grover, 11 N. Hamp. 368; Agnew *v.* Bell, 4 Watts, 31; Mason *v.* Lord, 20 Pick. 447; Norton *v.* Coons, 3 Denio, 130; Foster *v.* Johnson, 5 Verm. 60; Boyd *v.* McDonough, 39 How. Pr. R. (N. Y.) 389. Payment of the debt by one of several joint debtors will not operate as an extinguishment or preclude a recovery for his benefit against all, if the circumstances indicate that the intention was to purchase the demand and not to satisfy it, and if no duty is violated by keeping it alive. See McIntyre *v.* Miller, 13 Mees. & Wels. 247; Taylor *v.* Van Deusen, 3 Gray, 498; note to Dering *v.* Earl of Winchelsea, 130 (4th Am. ed.). The subject in England is now regulated by statute, 19 & 20 Vic., c. 97; and see Batchellor *v.* Lawrence, 9 C. B. (N. S.), 543, as to the right of a co-debtor paying a judgment to *compel* the creditor to assign it.

[3] See Craythorne *v.* Swinburne, 14 Ves. 160. See, also, Black *v.* Shreeve, 3 Hals. Ch. 440.

[4] Black *v.* Shreeve, 3 Halst. Ch. 457.

[5] Cowell *v.* Edwards, 2 B. & P. 268.

in equity, the burden of the debt is divided among the solvent sureties, and the party paying, therefore, recovers from each of the others an amount dependent upon the number of those who are actually able to pay.[1] At law, contribution could not have been enforced against the representatives of a deceased surety; but in equity the rule is otherwise. It is, therefore, well settled that the jurisdiction of courts of chancery still remains.[2]

330. Such being the origin of contribution as an equity, a few of the principles by which its application is regulated may be briefly stated. A surety is not entitled to speculate upon the debt. If he compromises the claim his co-sureties are entitled to the benefit of the compromise. They are responsible only for their proportion of the amount actually paid,[3] with interest.[4]

Before contribution can be enforced, the surety must actually have paid the debt;[5] and he must, moreover, resort in the first instance, to the principal. It is only when he fails to obtain reimbursement from the principal, that he is entitled to call upon his co-sureties.[6] On the other hand, the discharge of a surety from his principal obligation without discharging his co-sureties, will not relieve him of his liability to them for contribution.[7]

The circumstance that the sureties are bound by different

[1] Burrows *v.* M'Whann, 1 Dessaus. 409; Breckinridge *v.* Taylor, 5 Dana, 110; Hitchman *v.* Stewart, 3 Drew. 271; Mayor of Berwick *v.* Murray, 7 De G., M. & G. 497. Departure from the State has the same effect upon the rights and liabilities of the remaining sureties as insolvency. McKenna *v.* George, 2 Rich, Eq. 15.

[2] Wayland *v.* Tucker, 4 Grat. 267; Couch *v.* Terry, 12 Alab. 225; Chipman *v.* Morrill, 20 Cal. 130; Wright *v.* Hunter, 5 Ves. 792.

[3] Hickman *v.* McCurdy, 7 J.J. Marsh. 555. Nor has a surety any right to speculate upon his principal. Wynn *v.* Brooke, 5 Rawle, 106; Bonney *v.* Seely, 2 Wend. 481; Lawrence *v.* Blow, 2 Leigh, 30.

[4] Swan's Estate, 4 Ir. R. (Eq.) 209.

[5] Wood *v.* Leland, 1 Met. 387; Glass *v.* Pullen, 6 Bush, 346. But he may pay part of the debt by a set-off; and his right of subrogation will not be for the balance only, but will extend to the whole amount of the creditor's claim. City of Keokuk *v.* Love, 31 Iowa, 119.

[6] See Camp *v.* Bostwick, 20 Ohio St. 337. See, however, Bowen *v.* Hoskins, 45 Miss. 183. The rule at law is different, as the better opinion seems to be that in a common-law action, a surety may recover from his co-surety without showing the insolvency of the principal. See the reason explained in 1 Lead. Cas. Eq. 169.

[7] Clapp *v.* Rice, 15 Gray, 557.

instruments, or at different times, does not affect the right of contribution, provided always that they are bound for the same debt, and really occupy towards each other the position of co-sureties.[1] But if each suretyship is a distinct and separate transaction (as for distinct and separate portions of the same debt), the right of contribution will not exist.[2]

If the sureties are not bound for the same thing, or do not occupy towards each other the same relative positions, then one of three results may follow—either, first, the surety paying the debt may have no right of contribution; or, secondly, a surety first in point of time may have no remedy as against one who is subsequent; or, thirdly, a subsequent surety may have no right as against the first.[3] Of the first of the above results, the case of a substituted surety is an illustration; he has, of course, no right of contribution as against the surety whose place he takes.[4] Of the second class, an instance may be found in a case in which a note was signed by A. as principal, and B. as surety, and then by C. as "surety for the above names," and C. was held not liable to contribute to B.[5] The third of the above class of liabilities may be illustrated by the case of a party who becomes surety on a bail-bond or appeal-bond in an action against the principal in the original obligation, and is subsequently compelled to pay the debt. Such a surety, though subsequent in point of date, has no right to call upon a surety in the original obligation for contribution.[6] These various liabilities of sureties depend frequently upon the express understanding of the parties to the transaction, and oral testimony is,

[1] Dering *v.* The Earl of Winchelsea, 1 Cox, 318; Armitage *v.* Pulver, 37 N. Y. 494; Breckinridge *v.* Taylor, 5 Dana, 110, 112; Bell *v.* Jasper, 2 Ired. Eq. 597; Stout *v.* Vauce, 1 Robinson, (Va.), 169; Warner *v.* Price, 3 Wend. 397; Coope *v.* Twynam, 1 T. & R. 426.

[2] Moore *v.* Isley, 2 Dev. & Bat. (Eq.), 372; Langford *v.* Perrin, 5 Leigh, 552.

[3] See American note to Dering *v.* Earl of Winchelsea, 1 Lead. Cas. Eq. 157.

[4] Hutchins *v.* McCauley, 2 Dev. & Bat. Eq. 399; Longley *v.* Griggs, 10 Pick. 121.

[5] Harris *v.* Warner, 13 Wend. 400; Thompson *v.* Sanders, 4 Dev. & Bat. 404.

[6] Douglass *v.* Fagg, 8 Leigh, 588; Burns *v.* The Huntingdon Bank, 1 Pen. & Watts, 395; Schnitzel's Appeal, 13 Wright, (Pa.) 23. See however, Hartwell *v.* Smith, 15 Ohio St. 200.

as a general rule, admissible to show what that understanding was.[1]

As the right of contribution is an equitable right, it will not be enforced as against superior equities of a third party,[2] or of the co-surety; nor will it be enforced to the prejudice or injury of the creditor.[3]

331. As the right of contribution is one which exists between those who are equally liable for the same debt, so the right of Exoneration, as the term implies, exists between those who are successively liable. A surety who discharges an obligation is entitled to look to the principal for reimbursement, and to invoke the aid of a court of equity for this purpose,[4] and a subsequent surety who, by the terms of the contract, is responsible only in the case of the default of the principal and a prior surety, may claim exoneration at the hands of either.[5]

This right, like that of contribution, could not originally have been enforced at law; but a legal remedy now exists by virtue of an implied promise to indemnify. The equitable jurisdiction, however, is still maintained, on principles which have been before referred to.

The better opinion seems to be that a surety is entitled to recover from the principal not only the amount of the debt which he has paid, but also the costs incurred.[6]

The surety is entitled to file a bill against the principal at any time after the debt has fallen due, to compel payment, although he may not have been sued.[7]

It has been observed by a very learned judge and author that

[1] Barry *v.* Ransom, 12 N. Y. 462; Apgar *v.* Hiler, 4 Zab. 808; Hendrick *v.* Whittemore, 105 Mass. 23.

[2] Erb's Appeal, 2 P. & W. 296; Bank of Penn. *v.* Potius, 10 Watts, 152; Union Bank *v.* Edwards, 1 Gill & J. 346.

[3] Hollingsworth *v.* Floyd, 2 Har. & G. 87. In Herr *v.* Barber, 2 Mackey (D. C. Reps.) 545, it was held that one of several defendants guilty of a breach of trust who has paid a decree against them all cannot enforce contribution in equity from the others.

[4] Moore *v.* Young, 1 Dana, 516; Baxter *v.* Moore, 5 Leigh, 219; The Wesley Church *v.* Moore, 10 Barr, 273. The doctrine applies to a mortgage by a wife of her separate property for her husband's debt; Aguilar *v.* Aguilar, 5 Mad. 414; Neimcewicz *v.* Gahn, 3 Paige, Ch. 614; 11 Wend. 312; Savage *v.* Winchester, 15 Gray, 453.

[5] See Harris *v.* Warner, 13 Wend. 400; Thompson *v.* Saunders, 4 Dev. & Bat. 404.

[6] Wynn *v.* Brooke, 5 Rawle, 106; Hayden *v.* Cabot, 17 Mass. 169.

[7] Beaver *v.* Beaver, 11 Harris, 167; Ardesco Oil Co. *v.* N. A. Mining Co., 16 P. F. Sm. 381.

in equity a person who is entitled to be indemnified against loss is not obliged to wait until he has suffered, and, perhaps, been ruined, before having recourse to judicial aid.[1] In the ordinary case of principal and surety, as soon as the creditor has acquired the right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation.[2] Upon this principle it was recently held that where an agreement was entered into between two insurance companies, by which one agreed to re-insure certain risks of the other, the re-insured company could resort to equity to compel performance of the agreement without waiting to pay the original insured;[3] and this decision seems entirely warranted by the authorities already referred to. So, also, in conformity with the same principle, partners and directors who are individually liable to be sued on bonds and notes, which as between them and their copartners are to be regarded as the bonds and notes of the firm or company, are entitled to call for contribution before the bonds and notes are actually paid.[4]

332. The equity of exoneration is frequently applied in the administration of the assets of decedents. Thus, the personal property is generally the primary fund for the payment of debts; and hence it is well settled that if a person borrows money and gives his bond and mortgage for the debt, the mortgage is merely a collateral security for the personal obligation, and the heir or devisee may call upon the executor to exonerate the land by an application of the personal assets to the discharge of the mortgage.[5] The subject will be noticed hereafter.[6]

[1] Lindley on Partnership, Vol. I., p. 788 (3d ed.).

[2] Wooldridge *v.* Norris, L. R., 6 Eq. 410; Nisbet *v.* Smith, 2 Bro. Ch. C. 582. See, also, Pride *v.* Boyce, Rice's Eq. 276, 287; Bishop *v.* Day, 13 Verm. 81, 88; Hoffman *v.* Johnson, 1 Bland, Ch. 103, 105; Stevenson *v.* Taverness, 9 Grat. 398; Rice *v.* Downing, 12 B. Mon. 44; Note to Dering *v.* Earl of Winchelsea, 1 Lead. Cas. Eq. 135 (4th Am. ed.).

[3] Phila. Trust Co. *v.* Fame Ins. Co., 30 Leg. Int. 60; Fame Ins. Co.'s Appeal, 2 Norris, (Pa.) 405.

[4] The Norwich Yarn Co.'s Case, 22 Beav. 143. See, also, Hemming *v.* Maddick, L. R., 7 Ch. 395; case of Oriental Commer'l Bank, L. R., 3 Ch. 791; Cruse *v.* Paine, L. R., 6 Eq. 641; 4 Ch. 441.

[5] See case of Keyzey, Jr., 9 Serg. & Rawle, 71; Cumberland *v.* Codrington, 3 Johns. Ch. R. 229, 257; Hewes *v.* Dehon, 3 Gray, 205; Goodburn *v.* Stevens, 1 Maryl. Ch. 420; note to Duke of Ancaster *v.* Mayer, 1 Lead. Cas. Eq. 642.

[6] See *post*, § 348.

The equities of contribution and exoneration arise only when the payment is made in discharge of a binding obligation. If the payment is voluntary, it gives no title to contribution. Thus, a co-owner cannot, as a general rule, claim a *pro rata* reimbursement for the amounts expended by him for meliorations and repairs to the property.[1]

No right of contribution exists where the demand is *ex delicto*.[2] In cases of breach of trust, however, not involving actual fraud, contribution may be enforced by trustees as between themselves.[3]

333. It has been stated, already, that the case of suretyship was only one instance of the general doctrine of contribution. Some other instances may be briefly noticed. If a mortgaged estate is sold to several parties, and one of the parties pays the mortgage, he will be entitled to contribution.[4] This equity is not binding on the creditor, but if he renders its performance impossible by cancelling the debt as against one of the lots when he has notice of the prior conveyance, he can only enforce payment of a proportionable share as against the others.[5] This rule does not apply when the purchases of the different parcels take place at different times. If any parcel remains in the hands of the vendor, that parcel will be first liable; the purchaser of the last lot will be liable to make good the loss incurred by the purchaser of a prior lot, and the first purchaser will be the last person who can be held responsible in respect of his lot. In other words, the

[1] Hardy *v.* Sproule, 31 Maine, 71; Reed *v.* Bachelder, 34 Id. 205; Turner *v.* Burrows, 8 Wend. 144; Anderson *v.* Greble, 1 Ashmead, 136; Adams's Doct. of Eq. 267.

[2] Peck *v.* Ellis, 2 Johns. Ch. R. 131; Bartle *v.* Nutt, 4 Peters, 184. See, for exceptions to the general rule, Acheson *v* Miller, 2 Ohio (N. S.), 203; Moore *v.* Appleton, 26 Alab. 633.

[3] See Hill on Trustees, 814, notes (4th Am. ed.).

[4] White *v.* White, 9 Ves. 554; Jones *v.* Jones, 5 Hare, 440; Thomas *v.* Hearn, 2 Porter, 262; Chamberlayne *v.* Temple, 2 Rand. 384; Dupuy *v.* Johnson, 1 Bibb, 562; Poston *v.* Eubank, 3 J. J. Marsh. 42; Williams *v.* Craig, 2 Edw. Ch. 297; Aiken *v.* Gale, 37 N. Hamp. 501.

[5] Stirling *v.* Forrester, 3 Bligh, O. S. 575, 590; Stevens *v.* Cooper, 1 Johns. Ch. 425; Cheesebrough *v.* Millard, Id. 409; Guion *v.* Knapp, 6 Paige, 35; Paxton *v.* Harrier, 1 Jones, (Pa.) 312; Jones *v.* Myrick, 8 Gratt. 180; George *v.* Wood, 9 Allen, 83; Stillman *v.* Stillman, 6 C. E. Green, 126; Fassett *v.* Traber, 20 Ohio, 540. See, also, Lloyd *v.* Galbraith, 8 Casey, 103; Lock *v.* Fulford, 52 Ill. 166.

purchasers will be liable in the inverse order of their purchases.[1]

This rule, of course, only applies when the sale of the lot is made free of encumbrances. If the purchaser takes it subject to the mortgage, the presumption is that the amount has been deducted from the purchase-money, and the burden of the mortgage ought, therefore, justly to fall upon the vendee; and in such a case, if the vendor or those claiming under him by subsequent sales are compelled to pay the mortgage, they will be entitled to contribution or exoneration, as the case may be, at the hands of the first purchaser.[2]

334. The doctrine of general average is another illustration of the right of contribution. It is called into play when a loss arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo, in which case the loss must be borne proportionably by all who are interested. Thus, where goods are thrown overboard, or a portion of the ship's rigging cut away, to lighten and save the ship, or the ship itself is intentionally stranded to save her cargo from a tempest or an enemy, or a part of the cargo is delivered up by way of ransom, or is sold for the necessity of the ship; in all such cases, as the impending danger is common to all, the loss incurred in averting the same should be borne by all.

[1] Clowes *v.* Dickenson, 5 Johns. Ch. 235; 9 Cow. 403; Cowden's Est., 1 Barr, 267; Mevey's Appeal, 4 Id. 80; Paxton *v.* Harrier, 1 Jones, (Pa.) 312; Milligan's Appeal, 104 Pa. St. 503; Holden *v.* Pike, 24 Maine, 427; Shepherd *v.* Adams, 32 Id. 63; Allen *v.* Clark, 17 Pick. 47; (though see Parkman *v.* Welch, 19 Pick. 231); Pallen *v.* The Agricultural Bank, 1 Freem. Ch. 419; The Agricultural Bank *v.* Pallen, 8 Sm. & Marsh. 357; Thompson *v.* Murray, 2 Hill Ch. 204, 213; Wright *v.* Atkinson, 3 Sneed, 585; Conrad *v.* Harrison, 3 Leigh, 532; Blair *v.* Ward, 2 Stock. Ch. 119; Mount *v.* Potts, 8 C. E. Green, 188; The Commercial Bank *v.* The Western Reserve Bank, 11 Ohio, 444; Prickett *v.* Sibert, 75 Ala. 315. But in Kentucky, in Dickey *v.* Thompson, 8 B. Mon. 312, the court of appeals refused to follow the doctrine in Clowes *v.* Dickenson; and in Massachusetts its application would seem to depend upon the presence of covenants of warranty; Chase *v.* Woodbury, 6 Cush. 148; Bradley *v.* George, 2 Allen, 392; George *v.* Wood, 11 Id. 41. But elsewhere the question is considered one of *contract* simply, and the existence of the covenant is regarded merely as *evidence* by which the intention of the parties is to be ascertained. See Rawle on Cov. for Title, 532, 565 (4th ed.), where the authorities are examined; and Am. note to Aldrich *v.* Cooper, 2 Lead. Cas. Eq. 293 (4th Am. ed.).

[2] See Id. p. 303.

It was, at one time, thought that the sole jurisdiction to recover contribution in cases of general average resided in the court of chancery; but it is now settled that the jurisdiction of equity is only concurrent, and that the party seeking contribution may enforce his right through the medium of the common-law action of assumpsit.[1]

The equity of contribution also arises when one of several tenants in common of land which is subject to a lien, is compelled to pay more than his due proportion in discharge of the same.[2]

335. The equity of Subrogation springs naturally out of the two equities, just considered, of contribution and exoneration, and is, in fact, one of the means by which those equities are enforced.

Subrogation is the equity by which a person who is secondarily liable for a *debt*, and has paid the same, is put in the place of the creditor so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor, or of contribution against others who are liable in the same rank with himself.[3]

Suppose, for example, A. to be a creditor of B., and C. and D. to be sureties for B., and A., moreover, to possess the additional security of a mortgage on B.'s real estate. If, now, C. pays the debt, he will be entitled to have an assignment of the mortgage, and to enforce it against B.'s real estate, in order to assert his right of exoneration.[4]

So, also, if a co-surety has a security from the principal, the surety paying the debt will be entitled to the benefit of this security.[5]

[1] See notes to Birkley *v.* Presgrave, 1 Tudor's Lead. Cas. Merc. Law, 83; (112, 1st Am. ed.).

[2] Gearhart *v.* Jordan, 1 Jones, (Pa.) 325

[3] See Hess's Estate, 19 P. F. Sm. 272; note to Dering *v.* Earl of Winchelsea, 1 Lead. Cas. Eq. 136 (4th Am. ed.).

[4] See Drew *v.* Lockett, 32 Beav. 499. See, also, Billings *v.* Sprague, 49 Ill. 509; Kirkman *v.* The Bank, 2 Cold. 397; Dearborn *v.* Taylor, 18 N. Hamp. 153; Klopp *v.* Lebanon Bank, 10 Wright, (Pa.) 88; McNeills *v.* McNeills, 36 Alab. 109; Sears *v.* Laforce, 17 Iowa, 473; Lewis *v.* Palmer, 28 N. Y. 271; York *v.* Landis, 65 N. Carolina, 535; Storms *v.* Storms, 3 Bush, 77; Irick *v.* Black, 2 C. E. Green, 189; Rhame *v.* Lewis, 13 Rich. Eq. 269.

[5] Copis *v.* Middleton, T. & R. 231; Parham *v.* Green, 64 N. Carolina, 436;

The same doctrine is also frequently applied when a junior encumbrancer is compelled, for his own protection, to pay off a prior lien.[1]

336. This equity of subrogation is one eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is one, therefore, which is much encouraged and protected. This may be seen from the rule, which allows the surety to keep alive a judgment for the purpose of obtaining satisfaction out of the principal. Ordinarily the payment of a debt operates as its extinguishment, and the judgment obtained for the debt would necessarily fall with it. To apply the rule to the case of a surety paying the debt would obviously work injustice in many instances; for, by coming in as a simple contract creditor, the surety might lose his chance of reimbursement. It has accordingly been held, and must be considered to be the generally received doctrine, that a surety who pays a debt which has been reduced to judgment, is entitled to have the judgment kept alive for his benefit, and to enjoy, as against the principal debtor, exactly the same advantages which could have been claimed by the judgment-creditor. In England, indeed, the law had been settled the other way by Lord Eldon,[2] whose ruling was followed by Lord Brougham;[3] but the hardship of this ruling led ultimately to the passage of a statute authorizing the judgment to be kept alive for the benefit of sureties;[4] and the ruling in this country, except in Alabama, North Carolina and Vermont,[5] has been the other way, and the doctrine established as above stated.[6] Payment of

McCune *v.* Belt, 45 Mo. 174; Aldrich *v.* Hapgood, 39 Verm. 617; Brown *v.* Ray, 18 N. Hamp. 102; Agnew *v.* Bell, 4 Watts, 31; Hinsdill *v.* Murray, 6 Verm. 136; Moore *v.* Moore, 4 Hawks, 358; note to Dering *v.* Earl of Winchelsea, 1 Lead. Cas. Eq. 162. See, however, Hall *v.* Cushman, 16 N. Hamp. 462.

[1] Silver Lake Bank *v.* North, 4 Johns. Ch. 370; Mosier's Appeal, 6 P. F. Sm. 76. See, also, Wallace's Appeal, 5 Barr, 103.

[2] Copis *v.* Middleton, 1 T. & R. 229.

[3] Hodgson *v.* Shaw, 3 My. & K. 190.

[4] 19 & 20 Vic. c. 97.

[5] Houston *v.* The Bank, 25 Alab. 250; Briley *v.* Sugg, 1 Dev. & Bat. (Eq.) 366; Pierson *v.* Catlin, 18 Verm. 77.

[6] Lidderdale *v.* Robinson, 2 Brock. 160; 12 Wheat. 594; Lathrop & Dale's Appeal, 1 Barr, 512; Cottrell's Appeal, 11 Harris, (Pa.) 294; Bailey *v.* Brownfield, 8 Id. 41; Fleming *v.* Beaver, 2 Rawle, 128; Wright *v.* Grover, 1 Norris, (Pa.) 80; Goodyear *v.* Watson, 14 Barb. 481; Marsh *v.* Pike, 10 Paige,

the debt, in short, is considered to operate as an assignment of it; and the equity of subrogation has received a more liberal construction in this country than in England.

337. The creditors of a surety whose liens upon the surety's real estate are disturbed by its application to pay the debt of the principal, are entitled to the same right of subrogation as the surety himself,[1] and this right cannot be defeated by the assignment or transfer of the surety;[2] and, on the other hand, the assignee of the debt, or a subsequent guarantor of the same, will be entitled to be subrogated to all the remedies against the original surety.[3] A mere stranger who pays the debt cannot claim to be subrogated;[4] but if such payment is in fact a purchase of the debt, and is intended to operate as such, the assignee will acquire as an incident to his purchase the right of subrogation. The question of subrogation in such a case is a question of law, dependent, however, upon the preliminary question of fact whether a purchase or extinguishment of the debt was intended.[5]

If the owner of a debt assigns it with a guaranty, and is subsequently obliged to make his guaranty good and pay the debt, he will be subrogated to the rights of the assignee as against the principal and sureties in the original debt.

If one surety takes a security from the principal for his own indemnity, it will enure to the benefit of all the sureties.[6]

595; Tinsley *v.* Anderson, 3 Call 285; McDougal *v.* Dougherty, 14 Geo. 674; Burrows *v.* McWhann, 1 Dessaus. 409; Norwood *v.* Norwood, 2 Har. & Johns. 238; Watkins *v.* Worthington, 5 Bland, 509; Atwood *v.* Vincent, 17 Conn. 575; Norton *v.* Soule, 2 Greenl. 341; Neilson *v.* Fry, 16 Ohio St. 552; Allen *v.* Dermott, 80 Mo. 56; Bushong *v.* Taylor, 82 Id. 660; Am. note to Dering *v.* Earl of Winchelsea, 1 Lead. Cas. Eq. 137, *et seq.* (4th Am. ed.).

[1] Neff *v.* Miller, 8 Barr, 348. In this case Harrisburg Bank *v.* German, 3 Barr, 303, was overruled. See Huston's App., 19 P. F. Sm. 488. See, also, Gearhart *v.* Jordan, 1 Jones, 325; and Lloyd *v.* Galbraith, 8 Casey, 103.

[2] Huston's Appeal, 19 P. F. Sm. 485.

[3] Hughes *v.* Littlefield, 18 Me. 400; Carter *v.* Jones, 5 Ired. Eq. 196; Matthews *v.* Aiken, 1 Comst. 595; Talmage *v.* Burlingame, 9 Barr, 21; Peak *v.* Dorwin, 25 Vt. 28.

[4] Webster's & Goldsmith's App., 5 Norris, 409; Re N. R. Constr. Co., 38 N. J. Eq. 433; Wormer *v.* Waterloo Agr. Works, 62 Ia. 699.

[5] See Swan *v.* Patterson, 7 Md. 164; Belshaw *v.* Bush, 11 Com. B. 191; Am. note to Dering *v.* Earl of Winchelsea, 1 Lead. Cas. Eq. 155.

[6] West *v.* Belches, 5 Munf. 187; McMahen *v.* Fawcett, 2 Rand. 514; Gregory *v.* Murrell, 2 Ired. Eq. 233; Hinsdill *v.* Murray, 6 Vt. 136; Elwood *v.* Deiffendorf, 5 Barb. 398; Rice *v.* Morton, 19 Miss. 253; Silvay *v.* Dowell, 53 Ill.; McCune *v.* Bell, 45 Mo. 174.

The principal creditor is entitled to the benefit of any security given to a surety by way of indemnity.[1]

The above cases are merely instances of the right of subrogation, and are not by any means intended as defining narrowly the limits of the doctrine. The principle is a general one, and will apply in every instance (except in the case of a mere stranger) where one man has paid a debt for which another is primarily liable.[2]

The right may exist, moreover, independently of contract, and may be enforced in some cases, not so much as a distinct equity, but as the means of enforcing general equities growing out of fraud. Thus in Everston *v.* The Central Bank,[3] money was loaned on a forged mortgage and was obtained for the purpose of discharging a prior mortgage—which was done. It was held that the mortgagee of the forged mortgage might, under such circumstances, and in the absence of intervening encumbrances, be subrogated to the rights of the prior mortgagee. It will be noted that in such cases, subrogation is used rather as part of the machinery to redress fraud, than as a substantial and independent equity.

The right of subrogation will not, however, exist between parties who are equally bound—as, for example, copartners, co-obligors and co-contractors, except, of course, by virtue of a special contract.[4] Such a special contract may exist, for example, where an outgoing partner takes a covenant from the remaining members of the firm to pay the partnership debts, and save him harmless. He stands, under these circumstances, in the position of a surety, and may be subrogated to the remedies of the creditors if the covenant be not fulfilled.[5]

338. The right of subrogation, like that of contribution, rests not on contract, but on general principles of equity.[6] "It

[1] See Wallace's Appeal, 5 Barr, 103; Mosier's Appeal, 6 P. F. Sm. 76; Rice's Appeal, 29 Id. 168; Rardin *v.* Walpole, 38 Ind. 146; Burwell *v.* Fauber, 21 Gr. 446; Osborn *v.* Noble, 46 Miss. 449; Moses *v.* Murgatroyd, 1 Johns. Ch. 129; Maure *v.* Harrison, 1 Eq. Ab. 93; Phillips *v.* Thompson, 2 Johns. Ch. 421.

[2] 1 Lead. Cas. Eq. 154 (Am. note).

[3] 33 Kans. 353.

[4] Baily *v.* Brownfield, 8 Harris, (Pa.) 41; Oakley *v.* Pasheller, 10 Bligh, N. R. 548; Fessler *v.* Hickernell, 1 Norris, (Pa.) 150.

[5] Aflalo *v.* Fourdrinier, 6 Bing. 306; Wood *v.* Dodgson, 2 Maule & Sel. 195; Butler *v.* Birkey, 13 Ohio (N. S.) 514; The Ætna Ins. Co. *v.* Wires, 28 Vt. 93.

[6] Hayes *v.* Ward, 4 Johns. Ch. R. 123; Hoover *v.* Epler, 2 P. F. Sm. 522;

is a rule," says Chancellor Kent, " which is founded on natural justice, and is recognised in every cultivated system of jurisprudence. * * * It rests on the basis of mere equity and benevolence."[1] Being an equitable right, it is consequently subject to the general qualification by which all equities are affected, namely, that it must not be enforced to the detriment of equal or superior equities existing in other parties, nor where its enforcement would operate to the prejudice or injury of the creditor;[2] and cannot therefore be insisted upon until the creditor is fully paid and satisfied. And it has been said that it will not be enforced as against a legal right.[3]

It is immaterial that the surety did not know of the existence of the security to which he seeks to be subrogated. Whenever he discovers its existence he will be entitled to its benefit.[4]

The equity of subrogation is one which the surety is entitled to exercise against the *debtor*, but it does not give him the right to control the action of the *creditor*. The creditor may pursue any of his remedies which he sees proper to use, and the surety cannot, as a general rule, compel him to resort to any particular securities in the first instance. Special circumstances may, however, take the case out of the general rule, and give the surety a right to require the creditor to look to certain liens before coming upon the surety.[5] In Pennsylvania, however, under the effect given to a guaranty, the creditor must first push the principal debtor to insolvency before resorting to the party secondarily liable.[6]

The surety may file a bill to compel payment by the principal as soon as the debt becomes due; and he may make the creditor a party to the bill, and avail himself of the creditor's remedies.[7]

Knyer *v.* Knyer, 6 Watts, 221; Wallen's Appeal, 5 Barr, 103; Bleakley's Appeal, 16 P. F. Sm. 191; Steele's Appeal, 22 Id. 102.

[1] Cheesebrough *v.* Millard, 1 Johns. Ch. 412.

[2] Erb's Appeal, 2 P. & W. 296; Wagner *v.* Elliott, 95 Pa. St. 489, *ante*, page 392, notes.

[3] Fink *v.* Mahaffy, 8 Watts, 384.

[4] 1 Lead. Cas. Eq. 144.

[5] Hayes *v.* Ward, 4 Johns. C. R. 123; Kent *v.* Matthews, 12 Leigh, 573; Railroad Co. *v.* Claghorn, 1 Speer's Eq. 545; Irick *v.* Black, 2 C. E. Green, 189.

[6] Parker *v.* Culvertson, 1 Wal. Jr. 149; Marberger *v.* Pott, 4 Harris, 13; Reigart *v.* White, 2 P. F. Sm. 438.

[7] Lead. Cas. Eq. 144; Dempsey *v.* Bush, 18 Ohio St. 376.

339. While it is true that a surety cannot directly control the action of the creditor in regard to the securities held by the latter, it has nevertheless been considered that it is the surety's right and a part of his equity to see that the creditor makes a prompt use of the remedies in his hands, and that nothing should be lost by reason of the creditor's supineness or negligence. Following out this thought, the courts of several States in the Union have established the rule that equity will compel the creditor to sue at the request of the surety, and will hold the surety discharged if the request be not complied with, provided that such failure to comply has resulted in actual injury, which must be shown by proving that the principal was solvent when the request was made, and became insolvent subsequently, and provided further, that accompanying the request, there be an explicit notice that in case the creditor shall fail to sue, the surety will thereupon hold himself discharged.[1] This doctrine has been established in New York, Pennsylvania, Alabama, Arkansas, and some other States;[2] but it has been rejected as unsound in most of the States of the Union.[3]

The surety may be relieved from his obligation by any variation of the contract between the creditor and principal, made without the surety's consent; for he has a right to say, in such a case, *non hæc in fœdera veni.*

340. The doctrine of Marshalling grows out of the principle that a party having two funds to satisfy his demand shall not, by his election, disappoint a party who has only one fund. If A., for example, holds a first mortgage against two parcels of real estate, and B. is the owner of a subsequent mortgage against only one of these parcels, natural justice would seem to require that A. should not resort in the first instance to the parcel covered by B.'s mortgage, but should endeavor to collect his debt from the lot charged with his encumbrance alone, and resort to the portion covered by B.'s mortgage, only for the purpose of making up any deficiency. Justice further requires that if A. does resort, in the first place, to the parcel covered

[1] Singer *v.* Troutman, 49 Barb. 183; King *v.* Baldwin, 17 Johns. 384; Rutledge *v.* Greenwood, 2 Dessaus. 389; Bruce *v.* Edwards, 1 Stew. 11; Cope *v.* Smith, 8 S. & R. 110; Hellen *v.* Crawford, 8 Wright, (Pa.) 105; Conrad *v.* Foy, 18 P. F. Sm. 381.

[2] See preceding note.

[3] See American note to Reese *v.* Berriugton, 2 Lead. Cas. Eq. 974.

by B.'s mortgage, the latter, thus disappointed in his security, shall be subrogated to A.'s rights as against the other parcel; and in this way, while sufficient scope is given to the rights of one party, protection is, at the same time, afforded to those of the other.[1]

341. It will be seen from the above illustration that the equity of marshalling would seem to be capable of being carried into effect in one of two ways, either, first, by restraining the party against whom it exists from using a security to the injury of another; or, secondly, by giving the party entitled to the protection of this equity the benefit of another security in lieu of the one of which he has been disappointed. In other words, the right might be enforced either by injunction against the paramount creditor, or by subrogation in favor of the junior creditor. In practice, however, the latter of these two methods is the one most usually employed; and the sounder doctrine seems to be that the first of the two ought not to be resorted to except under very peculiar circumstances. It is true that there are many dicta to the effect that a creditor will be restrained from resorting to one of two sources of payment, and compelled to look to the other;[2] but in practice the rule has been seldom applied (except under peculiar circumstances), because it would appear to be unjust that a creditor who had taken pains to obtain ample security should be limited in his rights of enforcement, and exposed to delay; more especially as the ends of justice can in general be completely attained by the application of the doctrine of subrogation.[3] A paramount encumbrancer

[1] In support of the general doctrine stated in the text, see Cheesebrough *v.* Millard, 1 Johns. C. R. 409; Ramsey's Appeal, 2 Watts, 228; Bruner's Appeal, 7 Watts & Serg. 269; Hannegan *v.* Hannah, 7 Blackf. 355; Briggs *v.* The Planters' Bank, 1 Freem. Ch. 574; American note to Aldrich *v.* Cooper; 2 Lead. Cas. Eq. 260 *et seq.* (4th Am. ed.).

[2] Aldrich *v.* Cooper, 8 Ves. 382; Clowes *v.* Dickenson, 9 Cowen, 403; Greenwood *v.* Taylor, 1 Russ. & My. 185; Agricultural Bank *v.* Pallen, 8 Sm. & Marsh. 357; Thompson *v.* Murray, 2 Hill Ch. 213; N. Y. Steamboat Co. *v.* N. J. Steamboat Co., 1 Hopkins, 460; Evans *v.* Duncan, 4 Watts, 24.

[3] Mason *v.* Bogg, 2 My. & Cr. 448; Neff's Appeal, 9 Watts & Serg. 36; Ramsey's Appeal, 2 Watts, 228; Shunk's Appeal, 2 Barr, 304; Arna's Appeal, 15 P. F. Sm. 74; Dunlap *v.* Clements, 7 Ala. 539; Moses *v.* Ranlet, 2 N. H. 488; Findlay *v.* Hosmer, 2 Conn. 350; West *v.* The Bank of Rutland, 19 Vt. 403; Brinkerhoff *v.* Marvin, 5 Johns. Ch. R. 320; Evertson *v.* Booth, 19 Johns. 486.

ought to be allowed to choose the method of collecting his debt, and all that a junior creditor can fairly ask is that he shall have liberty to resort to another source of payment in place of the one of which he has been deprived. Of course, where both funds are in court, or under its immediate control, the case is different. The rights of every one can be protected, and there is no harm in throwing the paramount creditor at once on the singly charged fund.[1] So, too, when the paramount creditor has been guilty of some negligence or default, as where he has put one of the funds beyond his own reach with the full knowledge that his debt cannot be satisfied out of the other fund without injury to the interests of third persons, he may be restrained from coming in upon the second fund.[2]

These, however, are exceptions, and perhaps the general rule in this country may be stated to be, that the right of marshalling is usually enforced through the equities of subrogation and contribution.

Nevertheless, there are decisions in some of the States in favor of the doctrine of compulsion;[3] while in England, there is some reason for thus restraining the creditor, as under the rule in Copis *v.* Middleton, the use of the doubly-charged security would operate as its extinguishment, and it could not be kept alive for the benefit of the subsequent encumbrances.[4]

342. The equity of marshalling is subject to certain qualifications which it has become necessary to lay down for the purpose of reaching exact justice.

It cannot be used to prejudice those who have an equal or superior equity against the debtor. Thus, if the land of the wife is mortgaged for the husband's debt, a subsequent judgment-creditor of the husband cannot claim that the mortgagee shall proceed first upon the property of the wife, nor can he claim to be subrogated to the mortgagor's security against the wife, because the equity of the latter is superior to that of the husband, and is necessarily superior to the equities of his creditors.[5] On

[1] See American note to Aldrich *v.* Cooper, 2 Lead. Cas. Eq. 276.

[2] Stevens *v.* Cooper, 1 Johns. Ch. R. 425; Paxton *v.* Harrier, 1 Jones (Pa.) 312; Parkman *v.* Welch, 19 Pick. 231; Berry *v.* The Church, 7 Maryl. 564; Mount *v.* Potts, 8 C. E. Green, 188.

[3] *Ante*, notes to §§ 338 and 339.

[4] American note to Aldrich *v.* Cooper, 2 Lead. Cas. Eq. 280.

[5] Reynolds *v.* Tooker, 18 Wend. 591; Ayres *v.* Husted, 15 Conn. 504; Johns *v.* Reardon, 11 Maryl. 465.

the other hand, the exercise of the right of marshalling cannot be defeated by the intervention of creditors of a later date.[1]

As a general rule, this equity will not exist as against a creditor of several debtors in favor of a creditor of one of the debtors. The two funds must belong to the same person. Thus, if A. and B. are debtors to C., and A. is also a debtor to D., and C. obtains satisfaction out of A., D. cannot claim to be subrogated to C.'s rights against B.[2] But this rule may admit of some exceptions. If A., in the case above put, were merely a surety, then it would be B.'s duty to discharge the debt, and if A.'s property were taken for that purpose, his creditors would have the right to be subrogated to the remedies of the joint creditors against B.[3] The duty of contribution between joint debtors may also in some instances be enforced by the creditors of one.[4]

The two funds must actually exist; the doctrine of marshalling cannot be invoked for the purpose of raising a fund.[5]

343. The result of throwing a creditor, who has two securities for his debt, upon the singly-charged fund, is of course to effect a payment of the debt so far as that fund will extend. Suppose, now, the general assets of the debtor are insufficient to meet all his liabilities, the question will then naturally arise, whether the creditor who has realized a portion of his debt shall be entitled to a dividend on the whole amount of his claim, or only upon the balance remaining after the appropriation of the fund which has been exclusively under his control.

The rule in bankruptcy was that the creditor was only entitled to prove for the residue; the right to resort to the prior security being treated, *pro tanto*, as payment.[6] But this rule is peculiar to the bankrupt law, and the better doctrine is that it is not applicable to cases outside of that law. Therefore the rule would seem

[1] Withers *v.* Carter, 4 Grat. 407; Ziegler *v.* Long, 2 Watts, 205; Bruner's Appeal, 7 Watts & Serg. 269.

[2] Ayres *v.* Husted, 15 Conn. 504; Dorr *v.* Shaw, 4 Johns. Ch. 17; Wise *v.* Shepherd, 13 Illinois, 41; Ex parte Kendall, 17 Ves. 520; Fessler *v.* Hickernell, 1 Norris (Pa.) 150; Estate of John H. Jones, 15 Phila. 584.

[3] King *v.* McVickar, 3 Sandf. Ch. 192; Wise *v.* Shepherd, 13 Ill. 41.

[4] See American note to Aldrich *v.* Cooper, 2 Lead. Cas. Eq. 222.

[5] The Professional Life Assurance Co.'s Case, L. R., 3 Eq. 668.

[6] By the 20th section of the Bankruptcy Act of 1867, the creditors of a bankrupt who hold security had the option either to prove for the balance of their claim, or to surrender the property held as security, and prove for their whole debt.

to be that the circumstance that the creditor had a right to resort to a fund which is open to him alone, shall not preclude him from coming in upon a fund of an insolvent estate which is common to all creditors, and obtaining a dividend on the full amount of his debt, subject to the common sense qualification that the total so received by him shall not exceed the sum due.

There has, indeed, been some difference of authority upon this point. But the case of Greenwood *v.* Taylor,[1] where the doctrine was laid down that the rule in bankruptcy applied also to the administration of insolvent estates, cannot now be considered as law;[2] and the decisions in the American courts which have assumed the same position, will perhaps be reconsidered when the point comes up again in the tribunals where they were rendered.[3] In several of the States the courts have refused to follow that decision.[4]

344. The class of cases which have ordinarily invited the application of the equity of marshalling in this country, is somewhat different from those which have called it into play in England. In England, this equity was most frequently employed in so ordering the claims of creditors entitled to payment out of the real estate of a deceased debtor, as not to interfere with those whose remedy was confined to personalty. Its application to debtor's estates during their lifetime was much less frequent. In the United States, however, the necessity for marshalling the assets of a decedent has been very much, if not altogether, done away with by the general rule that estates of all kinds, both real and personal, are considered assets for the payment of debts, and that specialty and simple contract creditors stand, as respects both classes of property, upon the same footing. But the equity of marshalling has been frequently applied in this country to the adjustment of the liabilities of debtors during their lifetime, and it is now an ordinary part of the machinery by which courts of equity, or courts wherein equitable principles are recognised, arrive at just conclusions in the application of a debtor's property to the discharge of his liabilities.

This equity is enforced for the benefit of junior encumbrancers;

[1] 1 Russ. & Myl. 185.

[2] Mason *v.* Bogg, 2 My. & Cr. 448.

[3] Note to Aldrich *v.* Cooper, 2 Lead. Cas. Eq. 286.

[4] West *v.* The Bank of Rutland, 19 Verm. 403; Shunk's Appeal, 2 Barr, 304; Bair & Shenk's Appeal, 1 Norris, (Pa.) 113; Findley *v.* Hosmer, 2 Conn. 350.

as, for example, for the benefit of a mortgagee of a particular piece of real estate, by subrogating him to the general lien of a prior judgment-creditor. It is enforced, also, very frequently for the protection of sureties, by enabling them to make use of the creditor's securities as against their principal. The method of applying the doctrine in both these instances has already been explained.

Under the general equity of marshalling assets may also perhaps fall a doctrine which is of quite modern birth and development, but which has been very frequently applied during the past ten years by the federal courts and by other tribunals in this country in the foreclosure of railways. The doctrine is that where property is placed in the hands of receivers to be administered by a court of chancery, the court will under certain circumstances give to certain claimants, principally those for labor and material, priority over existing mortgages. This priority will be given not only to claims which have arisen during the receivership, but also to those which may have accrued within a certain limited time, usually from three to six months, prior to the appointment of the receiver.[1]

Ordinarily, when a mortgagee applies for and obtains a receiver, the income which is thus collected is applicable to the payment of the interest or principal of the mortgage debt; but it is now settled by many decisions of the highest tribunals in the country, that if the court finds that such income should equitably be applied to the payment of claims, such as those above mentioned, which might but for the receivership have been paid out of the fund, it will direct such claims to be paid in preference to the mortgages.

This doctrine is usually known as the doctrine in Fosdick *v.* Schall, it having been first distinctively enunciated by the Supreme Court of the United States in the year 1878 in that case,[2] although it had been applied in some previous decisions by the federal circuit courts and by the courts of some states.[3]

The doctrine has since that time been recognised and even extended in many cases.[4] It has been based on various con-

[1] See High on Receivers, § 394 *a*, *et seq.*

[2] Fosdick *v.* Schall, 99 U. S. 235.

[3] These decisions, or most of them, will be found collected in a paper read by the author before the American Bar Association, at the session of 1879. See Proceedings of the American Bar Association, August 1879.

[4] See Burnham *v.* Bowen, 111 U. S. 776; Miltenberger *v.* Logansport Rd. Co., 106 Id. 286; Union Trust Co. *v.*

siderations, principally three: 1st, that where income has been diverted from the payment of current supplies and wages and applied to pay interest on mortgages, the fund thus diverted should be restored; 2d, that where mortgagees have suffered a railroad company to operate the road and remain in possession after default, the company may be considered as the agent of the bondholders, whose equity must yield to those whose labor or materials have kept the road in running order for the mortgagee's benefit; and 3d, that he who comes into equity to seek the aid of a receivership, must do equity to meritorious claims. It will be observed therefore that the rules of law or equity upon which this doctrine is based are either diversion or agency, or that "he who seeks equity must do equity."

It is probable that the first of these rules may be the true basis for this doctrine, and the subject therefore may, with great propriety, be noticed under the general equity of marshalling assets, for if the rule under consideration is based upon the theory of restoring property which has been wrongfully diverted, its application is only in accordance with the general principles of adjustment which have been considered in this chapter.[1]

Souther, 107 Id. 591; Union Trust Co. *v.* Ill. Midland Ry., 117 Id. 434.

[1] In Fosdick *v.* Schall, the following language was used by Waite, C. J., and may usefully be referred to as giving the grounds upon which the doctrine has been placed: "Railroad mortgages," he says, "and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character, and affect peculiar interests." * * * "When companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the

345. The application of this equity to the administration of estates of decedents may be briefly noticed.

According to the law, as it formerly existed in England, the equity of marshalling was frequently exercised in favor of simple contract creditors, when the personalty, which then constituted the only fund for the payment of debts, had been wholly or partially exhausted by superior creditors who might have resorted to real estate, viz., by specialty creditors, by mortgagees, or by vendors claiming a lien for unpaid purchase-money.[1] But in the United States, the property of a decedent, of all kinds, is applicable to the payment of his debts, and the same rule now exists, by statute, in England.[2] Hence the equity of marshalling is no longer resorted to for the purpose of regulating the rights of different sets of creditors of a decedent's estate; but is applied principally, if not altogether, in the settlement of the questions which arise between different claimants to the residuum of the estate after the payment of the debts.[3] Questions of this kind arise in this way: The assets of a decedent are not all equally applicable to the payment of his debts, but are liable to be applied only in a certain order, which varies in different States of the Union, being in some rather general, in others strictly defined and minute. Now, it is an almost universal rule that the general personal estate is the primary fund for the payment of debts, and, therefore, ought to be resorted to for that purpose before articles which have been specifically bequeathed are taken. A person, therefore, to whom there has been a specific bequest of a chattel, has a right to say that the general personal estate shall be exhausted in order to pay debts, before recourse is had against his specific legacy; in other words, the assets of a decedent will be marshalled in favor of a specific legacy, and against the general personal estate.

Again, two or more parties interested in an estate may stand

court from the future current receipts before anything derived from that source goes to the mortgagees. * * * If the mortgagee calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may, with propriety, be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity." The same judge expressed substantially the same views in the later case of Burnham *v.* Bowen, 111 U. S. 780. See, also, the remarks of Mr. Justice Bradley, in The Union Trust Co. *v.* Illinois Midland Rd., 117 U. S. pp. 455 and 456.

[1] Adams's Eq. 275.

[2] 3 & 4 Will. IV., c. 104.

[3] 2 Redf. on Wills, 853 (§ 74, 1).

exactly upon the same footing, so far as respects the liability of their interests to be taken for the payment of the decedent's debts. Now, if the interest or share of one of these parties is entirely taken, while those of the others are left untouched, he manifestly has, in justice, a right to say that the interests which stand exactly in the same position with his own shall contribute ratably to bear the common burden; in other words, he has an equity for contribution as against his co-legatees.[1]

346. The order in which assets are liable to be taken for the payment of debts is generally stated to be as follows: 1. The general personal estate, not expressly or by implication exempted; 2. Any estate particularly devised simply for the payment of debts; 3. Estates descended; 4. Property devised and bequeathed to particular devisees and legatees, but charged with the payment of debts; 5. General pecuniary legacies *pro rata;* 6. Specific legacies, and lands devised; 7. Personalty and realty over which the person whose estate is to be administered has exercised a general power of appointment.[2]

The general personal estate is, in the first instance, applicable to the payment of debts; and it is also the primary and natural fund for the payment of legacies; and if legacies or annuities are given generally, they are payable out of the personal estate only.[3]

347. The general personal estate may, however, be exempted from this primary liability, either by express provision in the

[1] 2 Redfield on Wills, 853, 854 (§ 74, 2).

[2] Smith's Manual of Equity, 270, 271. See, also, Hoover *v.* Hoover, 5 Barr, 351; Hays *v.* Jackson, 6 Mass. 149; Livingston *v.* Newkirk, 3 Johns. Ch. 312; Miller *v.* Harwell, 3 Murph. 194; McLoud *v.* Roberts, 4 Hen. & Munf. 443; Marsh *v.* Marsh, 10 B. Mon. 360; Chase *v.* Lockerman, 11 Gill & J. 185; Elliott *v.* Carter, 9 Grat. 549; Breden *v.* Gilliland, 17 P. F. Sm. 34; Clarke *v.* Henshaw, 30 Ind. 144; Snell's Eq. 221; Adams's Eq. 523 (6th Am. ed.) and notes; Story's Eq., § 577; Perry on Trusts, § 566; 2 Spence Eq. 817; American note to Duke of Ancaster *v.* Mayer, 1 Lead. Cas. Eq. 647 (3d Am. ed.). The only exception to this rule appears to be South Carolina, where it is held that property, whether real or personal, which has been specifically set apart by the will for the payment of debts, must be first applied to that purpose. Dunlap *v.* Dunlap, 4 Dess. 305; Pinckney *v.* Pinckney, 2 Rich. Eq. 235; note to Duke of Ancaster, *v.* Mayer, 1 Lead. Cas. Eq. 648 (3d Am. ed.).

[3] Smith's Manual of Equity, 271 Am. note to Aldrich *v.* Cooper, 2 Lead. Cas. Eq. 266 (3d Am. ed.).

will, or by implication from the circumstances attending the case.[1] Although the presumption is against intention to exonerate the personalty, yet where there are express words exempting the personalty, there can, of course, be no question as to its freedom from liability;[2] and the rule is the same, where there is on the face of the will a plain intention on the part of the testator to exonerate his personal estate.[3] In what way, however, this intention can be manifested with sufficient clearness, is, perhaps, a question attended with more difficulty. The primary fund will not be exonerated merely because another fund is provided, for such other fund is considered as auxiliary only, unless the primary fund be expressly exonerated.[4] The true rule would seem to be that the personal estate will be exempted only when there appears, upon the whole testamentary disposition taken together, an intention on the part of the testator, so expressed as to convince a judicial mind that it was meant not merely to charge the real estate, but so to charge it as to exempt the personal estate; for it is not upon an intention to charge the real, but upon an expressed intention also to discharge the personal estate, that the question is to be decided.[5] Without entering minutely into the subject it may be stated, as a general rule, that if the personal estate as a whole and not as a residue is given in the nature of a specific bequest, and another fund is supplied for the payment of the debts and legacies, and funeral and testamentary charges; or if the testator has, by any declaration in his will, shown an intention to preserve the personal estate entire for any given purpose whatever, that will be sufficient to exempt the personalty.[6]

[1] Note to Duke of Ancaster *v.* Mayer, 1 Lead. Cas. Eq. 646 (4th Eng. ed.); Collis *v.* Robins, 1 De G. & Sm. 131; 2 Jarm. on Wills, 564–600.

[2] Young *v.* Young, 26 Beav. 522.

[3] Coventry *v.* Coventry, 2 Dr. & Sm. 470; Clery's Appeal, 11 Casey, 54.

[4] Barnewell *v.* Cawdor, 3 Mad. 453; Watson *v.* Brickwood, 9 Ves. 447; 2 Spence Eq. 824.

[5] Bootle *v.* Blundell, 1 Meriv. 230; Walker's Est., 3 Rawle, 229; Canfield *v.* Bostwick, 21 Conn. 550; Sims *v.* Sims, 2 Stock. Ch. 158; Am. notes to Duke of Ancaster *v.* Mayer, 1 Lead. Cas. Eq. 640; and to Aldrich *v.* Cooper, 2 Id. 265 (3d Am. ed.). Originally express words were necessary to exempt the personal estate, and almost every judge has lamented that that rule has not been adhered to. 2 Spence Eq. 337.

[6] 2 Spence Eq. 341. See, also, Smith's Manual of Equity, 272; Webb

348. The personal estate may also be exonerated by implication, and an instance of such implied exoneration may be found in the case of a mortgage debt not created by the decedent, and which has been held, therefore, under certain circumstances, to be payable not out of the personalty, but out of the mortgaged premises. Thus, if a mortgage had been created by an ancestor, and the mortgaged estate had afterwards descended upon the heir, the personal estate of the heir would not be liable in favor of any person who should derive title by descent under him to the mortgaged premises, subject to the mortgage.[1]

349. Where the testator directs a sale of his real estate, and the proceeds and the personal estate are thrown into one mass, which he subjects to the payment of debts and legacies, the real and personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies.[2] But if real and personal estate are given together to one person subject to charges, but the real estate is not directed to be sold, the personal estate remains primarily liable.[3]

If the order in which assets should be applied to the payment of debts and legacies has been disturbed, this disturbance may (as has been already stated) be corrected by the application of the doctrine of marshalling. Thus, if pecuniary legacies have been taken for the payment of debts, the legatees are entitled to the equity of marshalling as against real estate descended, or as against real estate devised, but charged with the payment of debts. But they have no right to marshal as against lands

v. Jones, 2 Bro. C. C. 60; Dawes *v.* Scott, 5 Russ. 32; Forrest *v.* Prescott, L. R., 10 Eq. 545.

[1] Duke of Ancaster *v.* Mayer, 1 Bro. C. C. 454; Cumberland *v.* Codrington, 3 Johns Ch. 257; Keyzey's Case, 9 Serg. & R. 71; Garnett *v.* Macon, 6 Call, 308; Bank of U. S. *v.* Beverly, 1 How. 134; 1 Lead. Cas. Eq. 927 (4th Am. ed.). If, however, for any reason, the debt becomes the debt of the owner of the land, it must be paid out of his personalty. Hoff's Appeal 12 Harris, (Pa.) 200; Lennig's Est., 2 P. F. Sm. 139; Thompson *v.* Thompson, 4 Ohio, N. S. 333. See, also, Hirst's Estate, 35 Leg. Int. 222; (Hirst's Appeal, 11 Norris, 491), where the authorities are reviewed.

[2] Roberts *v.* Walker, 1 Russ. & M. 752; Robinson *v.* The Governors of London Hospital, 10 Hare, 19.

[3] Boughton *v.* Boughton, 1 H. L. Cas. 406; Tench *v.* Cheese, 6 De G., M. & G. 453 (but see Allan *v.* Gott, L. R., 7 Ch. 439); Williams on Executors, 1712 (7th Eng. ed.). See, also, Elliott *v.* Carter, 9 Grat. 541; Adams *v.* Brackett, 5 Met. 280; Cox *v.* Corkendall, 2 Beas. 138.

devised, for the interest of the devisee is not by law liable in priority to that of the legatee.

350. As a general rule, assets will not be marshalled in favor of a charity; the reason being that stated by Lord Hardwicke, in Mogg *v.* Hodges,[1] namely, that a court of equity is not warranted in setting up a rule of equity contrary to the common rules of the court merely to support a bequest which is contrary to law.[2]

CHAPTER VII.

LIENS.

351. Distinction between liens at common law and in equity.
352. Instances of equitable liens.
353. Vendor's lien for purchase-money.
354. Nature of this lien.
355. Waived by taking independent security.
356. Parties for and against whom the lien exists.
357. Deposit of title deeds.
358. Mortgages of personalty.
359. Pledges.
360. Liens in aid of equitable and legal rights.

351. A LIEN at common law has been defined to be a right in one man to retain that which is in his possession, belonging to another, till certain demands of him, the person in possession, are satisfied.[3] It will be observed that this lien is founded upon the idea of possession; and, consequently, as a general rule, if the possession is abandoned the lien is lost. It attaches exclusively to personal property.[4]

Besides the common-law liens there are certain liens, or rights in the nature of liens, which are wholly independent of possession,[5] which exist only in equity, and of which equity alone can take cognisance.[6]

In modern times the doctrine of equitable liens has been

[1] 2 Ves. Sr. 53.

[2] Note to Aldrich *v.* Cooper, 2 Lead. Cas. Eq. 103 (4th Eng. ed.).

[3] Per Grose, J., in Hammonds *v.* Barclay, 2 East, 235; 2 Spence Eq. 796.

[4] 2 Spence Eq. 796.

[5] Smith's Manual of Equity, 338.

[6] Gladstone *v.* Birley, 2 Meriv. 403; Cotesworth *v.* Stephens, 4 Hare 193; 2 Spence Eq. 803.

liberally extended for the purpose of facilitating mercantile transactions, and in order that the intention of parties to create specific securities may be justly and effectually carried out. A good example of the liens here referred to may be found in the case of Frith *v.* Forbes,[1] where bills of exchange drawn against a particular cargo of a ship, accompanied by letters of the consignor to the consignee referring to the bills, were held to create a lien upon the cargo. And while it is true that in a subsequent case[2] the court declined to accede to the bald proposition, that merely because a bill of exchange purports to be drawn against a particular cargo, it carries a lien on that cargo in the hands of every holder of the bill, and intimated that Firth *v.* Forbes was not to be regarded as of unimpeachable authority, yet that decision may properly be cited as showing the tendency of the modern doctrine upon this subject, and the disposition of the courts of chancery to carry out the contracts of parties as they meant them to be fulfilled.[3]

Other illustrations of such liens will be found in the instances given in a former chapter of the assignments of future cargoes by way of security; the assignments in such cases operating to create liens which could have had no existence at law.[4]

352. Many other instances of equitable liens of a more ancient

[1] 4 De G., F. & J. 409.

[2] Robey's Iron Works *v.* Ollier, L. R., 7 Ch. App. 695.

[3] The doctrine under consideration may be regarded as the outgrowth of the rule in Ex parte Waring, 19 Ves. 345; 2 Rose, 182; 2 Glyn & Jam. 404; where cash and bills which had been deposited to meet certain acceptances were held to be specifically applicable to that purpose. The decision in that case was placed by Lord Eldon on the ground of the double insolvency of the drawers and acceptors; but this ground has been considered in some of the modern cases as too narrow. See Powles *v.* Hargreaves, 3 De G., M. & G. 430. In others, however, it seems to be still recognised as the true ground; Vaughan *v.* Halliday, L. R., 9 Ch. 561. Instances of this rule and of the extent to which it has been carried in modern times may be found in The Bank of Ireland *v.* Perry, L. R., 7 Exch. 14; Ex parte The Alliance Bank, L. R., 4 Ch. 423; City Bank *v.* Luckie, 5 Id. 773; Ex parte Dewhurst, 8 Id. 965; In re New Zealand Banking Co. L. R., 4 Eq 226; Ex parte Smart, L. R., 8 Ch. 220; Laycock *v.* Johnson, 6 Hare, 209; Ranken *v.* Alfaro, L. R., 5 Ch. D. 786; Bispham on Contracts in Rem. In Hopkins *v.* Beebe, 2 Casey, 85, the Supreme Court of Pennsylvania, declined, under the circumstances of that case, to say that the holder of a bill had any right as against merchandise on which it was drawn

[4] *Ante*, p. 214 *et seq.*

character exist: such are the lien of a vendor for unpaid purchase-money; of one joint tenant of a lease for fines and expenses of renewal; for improvements which a person has innocently put upon the land of another, being encouraged thereto by the owner; by deposit of title deeds; of a trustee upon the trust estate for his expenses; of a solicitor upon papers or funds;[1] of a part owner of a ship upon her earnings; and many others.[2] A few of these will require particular attention; and among the first is the lien of the vendor of real estate for the unpaid purchase-money.

353. Where a vendor delivers possession of an estate to a purchaser, without receiving the purchase-money, equity, whether the estate be conveyed or only *contracted to be conveyed*, and although there was not any special agreement for that purpose, gives the vendor a lien upon the land for the unpaid purchase-money.[3] This has been the settled doctrine of the English courts for many years, having been established by a number of authorities, of which the leading one is considered to be Mackreth *v.* Symmons, decided by Lord Eldon in 1808.[4] In the United States the decisions upon the subject have not been uniform. In some of the States of the Union, and in the Federal courts, the doctrine of a vendor's lien has been adopted; in others it has been repudiated; while in still a third class, the English rule has been abrogated or modified by statute. In the first class are included the States of New York, New Jersey, Maryland, Tennessee, Mississippi, Georgia, Alabama, Missouri, Michigan, Illinois, Indiana, Ohio, Colorado, Arkansas, Kentucky, Iowa, Wisconsin, Minnesota, California, Florida, Texas, and perhaps, Oregon.[5] The

[1] See Francis *v.* Francis, 5 De G., M. & G. 108; Turner *v.* Letts, 7 Id. 243; Re Bank of Hindustan, L. R., 3 Ch. 125.

[2] See 2 Spence Eq. 797, 803. See, also, Hansett *v.* Harrison, 105 U. S. 401.

[3] 2 Sug. V. & P. 671 (375 Am. ed.).

[4] 15 Ves. 329; 1 Lead. Cas. Eq. 447 (4th Am. ed.). See, also, Jones on Mortgages, § 189 *et seq.*

[5] Stafford *v.* Van Rensselaer, 9 Cow. 316; Garson *v.* Green, 1 Johns. Ch. 308; Dubois *v.* Hull, 43 Barb. 26; Armstrong *v.* Ross, 5 C. E. Green, 109; White *v.* Casanave, 11 Harr. & J. 106; Carrico *v.* Farmers' Bank, 33 Md. 235; Ellis *v.* Temple, 4 Cold. 315; Stewart *v.* Ives, 1 Sm. & M. 197; Harvey *v.* Kelley, 41 Miss. 490; Russell *v.* Watt, Id. 602; Mims *v.* Macon & W. Rd., 3 Kelly, 333; Still *v.* Mayor, &c., City of Griffin, 27 Ga. 502; Haley *v.* Bennett, 5 Port. 452; Dennis *v.* Williams, 40 Alab. 633; McKnight *v.* Brady, 2 Mo. 89; Carroll *v.*

second class (where the doctrine has been rejected) includes Maine, Pennsylvania, Kansas, North Carolina, South Carolina,[1] and (quite recently) Massachusetts;[2] while in Vermont, Virginia and West Virginia, the lien is abolished by statute.[3]

In New Hampshire, Connecticut and Delaware, the question is undecided.[4] In the Federal courts the lien is recognised.[5]

354. As to the exact nature of the vendor's lien the expressions of text writers and judges have not been altogether uniform. By one great writer this lien is classed under the head of implied trusts;[6] while, on the other hand, a different view is taken in the American note to Mackreth *v.* Symmons;[7] and this latter opinion seems to be justified by the language of Mr. Justice Story in Gilman *v.* Brown,[8] and by the text of a treatise of unsurpassed authority.[9] It would

Van Rensellaer, Harring. Ch. 225; Sears *v.* Smith, 2 Mich. 243; Ortman *v.* Plummer, 52 Mich. 77; McLaurie *v.* Thomas, 39 Ill. 291; Evans *v.* Goodlet, 1 Blackf. 246; Tiernan *v.* Beam, 2 Ohio, 383; Anketel *v.* Converse, 17 Ohio St. 11; Francis *v.* Wells, 2 Col. 660; Shall *v.* Biscoe, 18 Ark. 142; Waddell *v.* Cartock, 41 Ark. 523; Burrus *v.* Roulhac, 2 Bush, 39; Maupin *v.* McCormick, Id. 206; Pierson *v.* David, 1 Iowa, 23; McDole *v.* Purdy, 23 Id. 277; Tobey *v.* McAllister, 9 Wis. 463; Daughaday *v.* Paine, 6 Min. 443; Truebody *v.* Jacobson, 2 Cal. 269; Burt *v.* Wilson, 28 Id. 632; Woods *v.* Bailey, 3 Florida, 41; Marks *v.* Baker, 20 Fla. 920; Pease *v.* Kelly, 3 Oreg. 417; (but see Kelly *v.* Ruble, 11 Oregon, 75); McAlpine *v.* Burnett, 23 Tex. 649.

[1] Philbrook *v.* Delano, 29 Maine, 410; Irvine *v.* Campbell, 6 Binn. 118; Stouffer *v.* Coleman, 1 Yeates, 393; Heist *v.* Baker, 13 Wright, (Pa.) 9; Simpson *v.* Mundee, 3 Kansas, 172; Brown *v.* Simpson, 4 Id. 76; Crawley *v.* Timberlake, 1 Ired. Eq. 346; Wynne *v.* Alston, 1 Dev. Eq. 163; Wragg *v.* Comp. Gen., 2 Dessaus. 509.

[2] Ahrend *v.* Odiorne, 118 Mass. 261. See opinion of Ch. J. Gray in this case for an examination of the origin of this lien.

[3] In Virginia, when no conveyance of the land has been made, the case is not within the statute: Day *v.* Hale, 22 Grat. 163.

[4] Arlin *v.* Brown, 44 N. H. 102; Chapman *v.* Beardsley, 31 Conn. 115; Budd *v.* Busti, 1 Harr. (Del.) 69.

[5] Bayley *v.* Greenleaf, 7 Wheat. 46; Bush *v.* Marshall, 6 How. 284; Chilton *v.* Lyons, 2 Black. 458; McLearn *v.* McLellan, 10 Peters, 640; Galloway *v.* Finley, 12 Id. 264.

[6] Story's Eq. § 1219. See, also, Snell's Principles of Eq. 105; note to 2 Sug. V. and P. 376 (8th Am. ed.). See, also, Ringgold *v.* Byran, 3 Maryl. Ch. 488; Moreton *v.* Harrison, 1 Bland, 491; and Iglehart *v.* Armiger, Id. 516, 524, 525.

[7] 1 Lead. Cas. Eq. 373.

[8] 1 Mason, 191. "It (the lien) is not therefore an equitable estate in the land itself, although that appellation is loosely applied to it." See 4 Wheat. 292, note.

[9] Sug. V. and P. 379 (8th Am. ed.).

seem to be plain that this lien is not a trust in the sense of giving the vendor an equitable *title;* but that what he has is a charge or right which has its inception only on bill filed.[1]

355. The lien of a vendor for unpaid purchase-money does not arise, or rather is considered as waived, if a distinct and independent security for the purchase-money is taken. The plainest case, perhaps, is where a mortgage is taken on another estate, the obvious intention of burdening one estate being that the other shall remain free and unincumbered.[2] Any other independent security, as, for example, a pledge of stock, a mortgage on the land sold, or the like, would have the same effect.[3] But the taking of such independent security, although evidence of a waiver, is not conclusive evidence.[4]

But a mere personal security, as, for example, a bond, or a bill, or a promissory note, will not of itself operate as a waiver of the lien.[5] Where, however, the bill or note is taken as *payment* of the consideration-money, in other words, where the security was in fact the thing bargained for, the lien is gone.[6] And where the vendor takes a negotiable note drawn by a third person and endorsed by the purchaser, or drawn by the pur-

[1] See 1 Lead. Cas. Eq. 366 (Am. note.).

[2] By the Master of the Rolls in Nairn *v.* Prowse, 6 Ves. 752, 760. See, also, Earl of Jersey *v.* Briton Ferry Floating Dock Co., L. R., 7 Eq. 409. See, however, Boos *v.* Ewing, 17 Ohio, 500; Anketel *v.* Converse, 17 Ohio St. 11.

[3] Nairn *v.* Prowse, 6 Ves. 752; Richardson *v.* Ridgely, 8 Gill & J. 87; White *v.* Dougherty, 1 Martin & Y. 309; Young *v.* Wood, 11 B. Mon. 123; Mattix *v.* Weand, 19 Ind. 151; Harris *v.* Harlan, 14 Id. 439; Shelby *v.* Perrin, 18 Tex. 515; Camden *v.* Vail, 23 Cal. 633; Hadley *v.* Pickett, 25 Ind. 450; Mims *v.* Macon, etc., R. R. Co., 3 Kelly, 333; Little *v.* Brown, 2 Leigh, 353; Cresap *v.* Manor, 63 Tex. 485; Brown *v.* Gilman, 4 Wheat. 291; Fish *v.* Howland, 1 Paige, 30; Phillips *v.* Saunderson, 1 Sm. & M. Ch. 462.

[4] Manly *v.* Slason, 21 Verm. 271; Daughaday *v.* Paine, 6 Minn. 443; Mackreth *v.* Symmons, *supra*; 2 Sug. V. & P. 386, notes.

[5] Collins *v.* Collins, 31 Beav. 346; Hughes *v.* Kearney, 1 Sch. & Lef. 134; Winter *v.* Lord Anson, 1 Sim. & Stu. 434; 3 Russ. 488; White *v.* Williams, 1 Paige, 502; Garson *v.* Green, 1 John. Ch. 308; Mims *v.* Macon Railroad Co., 3 Kelly, 333; Baum *v.* Grigsby, 21 Cal. 172; Thornton *v.* Knox, 6 B. Mon. 74; Pinchain *v.* Collard, 13 Tex. 333; Manly *v.* Slason, 21 Verm. 271; Van Doren *v.* Todd, 2 Green Ch. 397; Tobey *v.* McAllister, 9 Wis. 463; Hoggatt *v.* Wade, 10 Sm. & Marsh. 143; note to Mackreth *v.* Symmons, 1 Lead. Cas. Eq. 464, 484.

[6] Buckland *v.* Pocknell, 13 Sim. 406 Note to 1 Lead. Cas. Eq. 470 (4th Am ed.).

chaser and endorsed by a third person, the presumption of the lien is thereby repelled.[1]

Where the conveyance is made in consideration of the covenants entered into by the same deed for the payment of the price, there is no room for any *implied* security, and hence no vendor's lien will arise.[2]

356. As to the parties for and against whom the vendor's lien exists, it may be remarked, in the first place, that the lien will exist in favor of a legatee (for example) whose legacy has been taken to pay for the purchase of an estate in the hands of the heir; in other words, the purchased estate and the personal estate will be marshalled.[3] The lien is enforceable against all persons claiming under the vendee with notice, although for a valuable consideration,[4] but not as against a *bona fide* purchaser without notice.[5]

In the American note to Mackreth *v.* Symmons, it is said that the vendor's lien does not necessarily prevail over that of judgment-creditors of the vendee, but that "it depends upon the relative equities and rights of the disputants, in comparison with one another;"[6] and that "lien-creditors will supplant one who, though he had a right in equity to charge the land, through his own *laches* and default failed to secure a lien."[7] Mr. Justice Story, however, in his Commentaries on Equity Jurisprudence, says that the lien of a vendor "will prevail against the judgment-creditor of a vendee before an actual conveyance of the estate has been made to him, and as it should seem also

[1] 2 Sug. V. and P. 386, note k, and cases cited.

[2] Clarke *v.* Royle, 3 Sim. 499; Earl of Jersey *v.* Dock Co., L. R., 7 Eq. 409; 2 Sug. V. and P. 381 (8th Am. ed.). See Winter *v.* Lord Anson, 1 Sim & St. 434; 3 Russ. 488.

[3] Austen *v.* Halsey, 6 Ves. 475; Cheesebrough *v.* Millard, 1 Johns. Ch. 412 Iglehart *v.* Armiger, 1 Bland, 519.

[4] Mackreth *v.* Symmons, 15 Ves. 329; Meigs *v.* Dimock, 6 Conn. 458; Stafford *v.* Van Rensselaer, 9 Cowen, 316; Magruder *v.* Peter, 11 Gill & J. 217; Redford *v.* Gibson, 12 Leigh, 332; Mounce *v.* Byars, 16 Geo. 469; Cox *v.* Fenwick, 3 Bibb, 183; Williams *v.* Roberts, 5 Ohio, 35; 1 Lead. Cas. Eq. 496 (4th Am. ed.); 2 Sug. V. and P. 393.

[5] Bayley *v.* Greenleaf, 7 Wheat. 46; Schwartz *v.* Stein, 29 Maryl. 112; Blight's Heirs *v.* Banks, 6 Monroe, 192, 198; Gooch *v.* Baxter, 2 Duval. 389; Work *v.* Brayton, 5 Ind. 396. See, however, Day *v.* Hale, 22 Grat. 163.

[6] 1 Lead Cas. Eq. 374.

[7] Id.

against such a judgment-creditor after the conveyance."[1] But while, so far as those cases in which there has been no conveyance are concerned, it must be remembered that the right of a vendor is not a mere lien, but an *estate*, and it is difficult to see how that legal *estate* can be postponed to a mere charge against the equitable estate of the vendee, yet when there has been an actual conveyance of the legal title, it is equally difficult to see why the claims of creditors should be postponed to a secret encumbrance which the vendor has failed to render secure. It has, therefore, been held in several cases that the vendor's lien will not prevail against judgment-creditors, or against purchasers under an execution sale;[2] and the language of the court in Bayley *v.* Greenleaf[3] is certainly in favor of the creditors. There are, however, some decisions the other way.[4]

An equitable mortgage created by the purchaser, by a deposit of title deeds in favor of a person who takes *bona fide*, and without notice, will give the latter a preferable equity, which will overreach the vendor's lien on the estate for any part of the purchase-money.[5]

Persons coming in under the purchaser by act of law, as assignees of a bankrupt, are bound by the lien; although they had no notice of it.[6]

The purchaser of an estate who has paid part of the purchase-money, has a lien on it to that extent if the vendor cannot make title.[7]

357. The next equitable lien which deserves consideration is that which grows out of a deposit of title deeds. The *prima*

[1] Story's Eq. Jurisp., § 1228.

[2] Johnson *v.* Cawthorn, 1 Dev. & Bat. Eq. 32; Harper *v.* Williams, Id. 379; Crawley *v.* Timberlake, 1 Ired. Eq. 346; Roberts *v.* Rose, 2 Humph. 145, 147; Hall *v.* Jones, 21 Maryl. 439.

[3] 7 Wheat. 46.

[4] Aldridge *v.* Dunn, 7 Blackf. 249; Parker *v.* Kelly, 10 Sm. & Marsh. 184.

[5] 2 Sugden V. and P. 396 (8th Am. ed.); Rice *v.* Rice, 2 Drewry, 73; Schwarz *v.* Stein, 29 Maryl. 112. See Pierce *v.* Milwaukee and St. Paul R. R. Co., 24 Wis. 551, where a mortgage of subsequently acquired real estate was held to be a lien thereon in preference to the lien of the vendor of the real estate.

[6] 2 Sug. V. and P. 395.

[7] Wythes *v.* Lee, 3 Drewry, 396; Rose *v.* Watson, 10 H. L. Cas. 672; Aberaman Iron Works *v.* Wickens, L. R., 4 Ch. 101; 1 Lead. Cas. Eq. 474 (4th Am. ed.); 2 Sug. V. and P. 379.

facie effect of such a deposit would seem to be simply to create a lien upon the title deeds deposited, in the nature of a solicitor's lien upon papers in his possession: but it has been decided in England, and in some of the United States, that the deposit will not merely operate to create a lien upon the papers, but will enure as a charge upon the land itself in the nature of a mortgage. The first case in England in which this doctrine seems to have been authoritatively settled was Russel *v.* Russel, decided by Lord Thurlow in 1783;[1] and this decision, though strongly disapproved, has, nevertheless, been recognised by many cases as a binding authority;[2] and the doctrine may, therefore, be considered as well established in spite of its apparent infringement upon the Statute of Frauds.[3]

While the effect of a deposit of title deeds in creating a lien upon the estate may be considered as definitely settled, the ascertainment of the exact manner in which it operates is not unattended with difficulties. It has been decided that no agreement to execute a formal mortgage can be implied from such a deposit;[4] and it has also been held that an agreement to give a legal mortgage, accompanied by a deposit of the title deeds for the purpose of preparing such a mortgage, will not constitute a valid equitable mortgage.[5] On the other hand, a different conclusion from that reached in Norris *v.* Wilkinson was arrived at in several cases, and the balance of authority is, perhaps, in favor of the proposition that a delivery of deeds for the purpose of preparing a legal mortgage constitutes a valid equitable mortgage.[6] Whether an equitable mortgage can be implied from the

[1] 1 Bro. C. C. 269; 1 Lead. Cas. Eq. 674 (4th Eng. ed.).

[2] See Ex parte Coming, 9 Ves. 115; Pryce *v.* Bury, 2 Drewry, 42; Fenwick *v.* Potts, 8 De G., M. & G. 506; Daw *v.* Terrell, 33 Beav. 218; 1 Lead. Cas. Eq. 543.

[3] See Pryce *v.* Bury, 2 Drewry 42; Ferris *v.* Mullins, 2 Sm. & Giff. 378; and the remarks of Lord Abinger, in Keys *v.* Williams, 3 Y. & C. Ex. Ca. 55, 61. See Dixon *v.* Muckleston, L. R., 8 Ch. 155, where the deeds were accompanied by a letter which took the case out of the statute.

[4] Sporle *v.* Whayman, 20 Beav. 607.

[5] Norris *v.* Wilkinson, 12 Ves. 192; Ex parte Hooper, 1 Meriv. 7; Ex parte Pearse, 1 Buck, 525; Garnham *v.* Skipper, 34 W. R. 135.

[6] Edge *v.* Worthington, 1 Cox Ch. 211; Ex parte Bruce, 1 Rose, 374; Hockley *v.* Bantock, 1 Russ. 141; Keys *v.* Williams, 3 Y. & Col. 55; 1 L. Ca. Eq. 547.

simple fact, without more, of the adverse possession of title deeds seems to be doubtful.[1]

The security by deposit of title deeds has been held to extend to subsequent advances made upon the understanding that they were to be secured by the deposit.[2]

The only remaining points upon this subject that seem to require to be stated are that a lien may be created by the deposit of *part* only of the title deeds;[3] that it will be a charge only upon the interest of the party making the deposit;[4] and that the mortgagee's appropriate remedy is foreclosure.[5]

Mortgages by deposit of title deeds have been sustained in several States of the Union, although they have not been of frequent occurrence.[6] They have been disapproved of in Kentucky,[7] and rejected in Pennsylvania[8] and Ohio.[9] In Vermont the question is undecided.[10] In quite a number of cases agreements to give a mortgage have been held to create a lien.[11]

358. The next class of liens requiring attention are those which grow out of mortgages and pledges of personalty.

It has been stated in a former chapter that mortgages of personalty resemble, in most respects, mortgages of realty; so far, at all events, as the existence of the equity of redemption

[1] See Ex parte Coming, 9 Ves. 115; Chapman *v.* Chapman, 13 Beav. 308; Smith *v.* Constant, 4 De G. & Sm. 213; Burgess *v.* Moxon, 2 Jur. N. S. 1059.

[2] Ex parte Kensington, 2 V. & B. 79; James *v.* Rice, 5 De G., M. & G. 461; 1 Lead. Cas. Eq. 545.

[3] See Ex parte Chippendale, 1 Deacon, 67; Lacon *v.* Allen, 3 Drewry, 579; Roberts *v.* Croft, 2 De G. & J. 1.

[4] Williams *v.* Medlicot, 6 Price, 495; Turner *v.* Letts, 20 Beav. 185.

[5] Redmayne *v.* Forster, L. R., 2 Eq. 467; though see Tuckley *v.* Thompson, 1 Johns. & H. 126. See the case of Northern Counties Ins. Co. *v.* Whipp, 26 Ch. D. 482, for a statement of the cases in which a mortgagee by deposit of title deeds may acquire priority over an earlier and legal mortgagee.

[6] Rockwell *v.* Hobby, 2 Sand. Ch. 9; Case *v.* Peck, 21 N. Y. 587; Stoddard *v.* Hart, 23 Id. 561: Griffin *v.* Griffin, 3 C. E. Green, 104; Welsh *v.* Usher, 2 Hill, (Ch.) 167; Williams *v.* Stratton, 10 Sm. & M. 418; Mounce *v.* Byars, 16 Ga. 469; Robinson *v.* Urquhart, 1 Beas. 515; Hackett *v.* Reynolds, 4 R. I. 512; Jarvis *v.* Dutcher, 16 Wis. 307; Richards *v.* Leaming, 27 Ill. 431; Keith *v.* Horner, 32 Id. 524.

[7] Vanmeter *v.* McFaddin, 8 B. Mon. 435.

[8] Bowers *v.* Oyster, 3 P. & W. 239; Shitz *v.* Dieffenbach, 3 Barr, 233; Edwards *v.* Trumbull, 14 Wr. (Pa.) 509.

[9] Probasco *v.* Johnson, 2 Disney, 96.

[10] Bicknell *v.* Bicknell, 31 Vt. 498.

[11] See Read *v.* Simons, 2 Dess. 552; Matter of Howe, 1 Paige, 125; Bank of Muskingum *v.* Carpenter, 7 Ohio, 21; Hall *v.* Hall, 50 Conn. 104; and other cases cited in Am. note to Russell *v.* Russell, 4 Lead. Cas. Eq. 954.

and of the remedy by foreclosure are concerned.[1] There is, however, this distinction between mortgages of real and personal property, namely, that while in the former a foreclosure suit is necessary in order to enable the mortgagee to sell, in the latter a sale may be had without the necessity of filing a bill. After breach of condition, and upon giving due notice, the mortgagee of personalty may sell the property mortgaged, as he could at civil law; and the title, if the sale is made *bona fide*, will vest absolutely in the vendee.[2]

It may also be observed that just as absolute sales of personal property to be acquired *in futuro*, which would not have been considered good under the strict rules of common law, may be sustained in equity; so, also, mortgages of similar property, which would not be recognised in courts of law, may be upheld in courts of chancery. Thus the case of Holroyd *v.* Marshall,[3] referred to in a former chapter,[4] was the case of a *mortgage* (*inter alia*) of personalty which did not come into the possession of the mortgagor until after the date of the mortgage. Such a transfer would be invalid according to the strict doctrine of the common law, but is now thoroughly recognised in courts of equity; and mortgages or charges in the nature of mortgages, upon personal property which is not already *in*, but is to come *into*, the possession of the mortgagor, are of not unfrequent occurrence in modern times, and are constantly upheld.[5] It is true, that according to the rule established in Twyne's Case,[6] transfers of personal property, unaccompanied by the delivery of possession, are to be considered fraudulent and void as against the creditors of the assignor; but even under the rule thus laid down it has been held that an exception exists in favor of articles which, at the time of the sale, are not susceptible of actual delivery, as, for example, merchandise at sea, or in the

[1] *Ante*, Part I., Chap. VII., p. 211, note 1.

[2] Tucker *v.* Wilson, 1 P. Wms. 261; Hart *v* Ten Eyck, 2 Johns. C. R. 100; Parker *v.* Brancker, 22 Pick. 46; De Lisle *v.* Priestman, 1 P. A. Browne, 176; Doane *v.* Russell, 3 Gray, 382; Story's Eq. Jurisp., § 1031.

[3] 10 H. L. Cas. 209.

[4] *Ante*, p. 214, *et seq.*

[5] See *ante*, pp. 216 and 217, and cases cited in the notes; to which may be added Groton Manufacturing Co. *v.* Gardiner, 11 R. I. 626.

[6] 1 Sm. Lead. Cas. 33.

hands of a third person.[1] Therefore, it is no objection to a mortgage of property to be acquired *in futuro*, that it is not delivered at once and is, therefore, liable to the rule in Twyne's Case, for the obvious reason that it falls entirely outside of the doctrine there enunciated. Indeed, the tendency in equity is not to regard the delivery of possession of personal property as always essential to a valid mortgage of the same;[2] and hence, mortgages of certain kinds of personal property, as, for example, of the rolling stock of a railroad, are of frequent occurrence. Such mortgages are, in many States, allowed and regulated by statute; but the same end is also attained through the modern equitable doctrines in regard to mortgages of personal property.[3]

359. Between a *mortgage* of personal property and a *pledge* thereof, there are one or two points of difference of considerable importance. "A mortgage," it was said in Jones *v.* Smith,[4] "is a pledge and more, for it is an absolute pledge to become an absolute interest if not redeemed at a certain time."

A pledge, therefore, differs, on the one hand, from a lien, which confers no right to sell, but only a right to retain until the debt in respect of which the lien was created has been satisfied;[5] and, on the other hand, from a mortgage, which conveys the entire property of the thing mortgaged to the mortgagee conditionally, so that when the condition is broken the property remains absolutely in the mortgagee, whereas a pledge never conveys the general property to the pledgee, but only a special property in the thing pledged.[6]

According to the modern authorities, the remedy of the

[1] Notes to Twyne's Case, 1 Sm. Lead. Cas. 33.

[2] Walcott *v.* Keith, 2 Forster, 196; Whittle *v.* Skinner, 23 Verm. 531.

[3] See Philadelphia, etc. R. R. Co. *v.* Woelpper, 14 P. F. Sm. 372; Ladley *v.* Creighton, 20 Id. 494; Morrill *v.* Noyes, 56 Maine, 465; 2 Redfield on Railways, 501, 508; Jones on Mortgages, §§ 152, 153, 154; *ante*, p. 217. In England liens are frequently created by debentures upon the "undertaking" of a company, by which the debenture holder acquires a charge upon all the property of the company, past and future, which he can enforce by filing a bill, and which will entitle him to priority if the company is wound up. See In re Panama, etc. Royal Mail Company, L. R., 5 Ch. 318.

[4] 2 Ves., Jr. 372.

[5] Thames Iron Works Co. *v.* The Patent Derrick Co., 1 Johns. & H. 93.

[6] American note to Coggs *v.* Bernard 1 Sm. Lead. Cas. 384.

pledgee is twofold; he may either file a bill in chancery in the nature of a foreclosure bill, and proceed to a judicial sale; or he may sell without judicial process upon giving reasonable notice to the pledgor to redeem, and of the intended sale.[1] It had, in former times, been the rule of common law, that the pledgee was obliged to have recourse to the process of law to call upon the pledgor to redeem; and that the right of redemption could not be destroyed by anything short of a judicial sale;[2] but the rule now appears to be settled in favor of the right of the pledgee to sell upon notice, without resorting to a foreclosure bill. The right to sell upon notice, however, is one in the exercise of which a great deal of care is required; and the pledgee may be held responsible if he does not strictly follow all the requirements of the law by which this right is fenced in.[3] The safer course in all cases would, therefore, be to file a bill, and obtain an order for a judicial sale.

Cases moreover may arise in which some other relief than an order of sale may be needed. Thus, in a recent case in Maine, a savings bank book had been delivered by the debtor to a third party for delivery to the creditor by way of pledge. The debtor having died, the creditor filed a bill for relief. It was held that the case was one in which a more complete remedy could be afforded in equity than by the exercise of the common-law right to sell the pledge; and the court by its decree fixed a time within which the administratrix of the debtor should have a right to redeem, in default of which the deposit should be taken charge of by an officer of the court and disposed of under the court's direction.[4]

[1] Stearns *v.* Marsh, 4 Denio, 227; Davis *v.* Funk, 3 Wright, (Pa.) 243; Diller *v.* Brubaker, 2 P. F. Sm. 502; Tucker *v.* Wilson, 1 P. Wms. 261; Lockwood *v.* Ewer, 9 Mod. 278; Pigot *v.* Cubley, 15 C. B. (N. S.) 701, and note, by the American editor; Worthington *v.* Tormey, 34 Maryl. 182; Strong *v.* Nat Mech. Bank Ass'n., 45 N. Y. 718; Case *v.* McCabe, 35 Mich. 101; note to Coggs *v.* Bernard, 1 Smith's Lead. Cas. 384; Story on Bailments, §§ 308, 310; 2 Kent's Com. 582.

[2] Story on Bailments; 2 Kent's Com., *ut sup.*

[3] As to the damages for a wrongful sale by the pledgee, see Johnson *v.* Stear, 15 C. B. (N. S.) 330, and note by the American editor. See, also, Donald *v.* Suckling, L. R., 1 Q. B. 585; Halliday *v.* Holgate, L. R., 3 Exch. 299: Fisher *v.* Brown, 104 Mass. 259.

[4] Boyton *v.* Payrow, 5 Reporter, 69 (Sup. Ct. of Maine).

It has been held that a court of equity will entertain a bill by the pledgor to compel a delivery of the pledge after the debt is paid;[1] and while it may be doubted whether under ordinary circumstances the remedy at law might not be adequate, yet it is clear that where the case involves questions of account, and the ascertainment of indefinite charges, a bill in equity is the proper remedy.[2]

360. Before leaving the subject of the present chapter it may be remarked that a court of chancery, in enforcing equitable titles or equitable rights, not unfrequently makes use of the doctrine of liens in order to render the relief afforded more effective. To give but a single instance. The doctrine of marshalling assets and securities results sometimes in the substitution of one party to the lien to which another had been entitled.

Thus, in a modern case, a firm in Ceylon consigned coffee to a firm in England, by whom the coffee, together with certain other securities of their own, was pledged to their broker to secure a debt. The English firm having become insolvent, the broker sold the coffee, and enough of the other securities to satisfy his debt; and it was held that the Ceylon firm were entitled as against the English firm in liquidation to have the remaining securities in the broker's hands marshalled, and to have a lien thereon for the balance due them in the coffee transaction.[3] So, also, a court of chancery will lend its assistance to the enforcement of a legal lien. Thus in Schotsman *v.* Lancashire Railway Company, a bill was filed to protect a vendor's right of stoppage *in transitu;* and although under the facts of the case the bill was dismissed, yet the right to bring such a bill was expressly recognised by the court.[4]

[1] Brown *v.* Runals, 14 Wis. 693. See, also, Ayres *v.* Wattson, 7 P. F. Sm. 360, a bill to obtain the surrender of a ground-rent and the surrender and satisfaction of a mortgage.

[2] Conyngham's Appeal, 7 P. F. Sm. 474; White Mts. R. R. *v.* Bay State Iron Co., 50 N. Hamp. 57; Merrill *v.* Houghton, 51 Id. 61 (a bill to redeem stock).

[3] Ex parte Alston, L. R., 4 Ch. 168.

[4] Schotsman *v.* Lancashire Railway Co., L. R., 2 Ch. 332.

PART III.

EQUITABLE REMEDIES.

CHAPTER I.

SPECIFIC PERFORMANCE.

361. General nature of this equitable remedy.
362. Inadequacy of common-law remedies.
363. Other grounds of the superiority of the remedy in equity.
364. Contracts for the sale of real estate.
365. May be enforced between original parties, and those who claim under them.
366. May be enforced as to real estate outside of the jurisdiction.
367. Covenants for further assurance.
368. Personal property.
369. When damages cannot be ascertained.
370. Other contracts.
371. Specific performance rests in discretion of the court.
372. Contract must be founded on a valuable consideration.
373. Meritorious considerations.
374. Adequacy.
375. Performance in specie must be necessary.
376. Must be in accordance with general equitable doctrines.
377. Contract must be mutual, certain, and practicable.
378. Purchaser not compellable to accept a doubtful title.
379. *Pyrke* v. *Waddingham.*
380. Other rules as to title.
381. Parol variations of written contracts; *Townshend* v. *Stangroom.*
382. Authorities in the United States.
383. Statute of Frauds; exceptions.
384. Part performance.
385. What constitutes part performance.
386. When the reduction of the contract to writing is prevented by fraud.
387. When the parol contract is admitted in the answer.
388. Specific performance with compensation for defects.
389. When the purchaser may be compelled to take.
390. When he may elect to take; limitations upon this doctrine.
391. Time to make out a title beyond the day.
392. Due diligence required.
393. Rule altered by express stipulations, or by presumptions growing out of the nature of the contract.
394. Surrounding circumstances.
395. Compensation; *Sir Hugh Cairns's Act.*
396. Doctrine in the United States.
397. Parties compelled to make good their representations.
398. Enforcing negative covenants.

361. It is one of the characteristic features of the relief afforded by courts of equity, that the effort always is to put the com

plainant in exactly the position he would have occupied had it not been for the wrongful act of the defendant; and in no head of chancery jurisdiction is this more strikingly exemplified than in the Equitable Remedy of Specific Performance of Contracts and Duties.

This remedy is one of the very earliest heads of the extraordinary jurisdiction of the High Court of Chancery, as will be seen by reference to the authorities from the Chancery Calendar, cited in the Introduction;[1] and not only is it one of the most ancient, but it has been found, also, to be one of the most useful of equitable means of redress, and has continued to be uninterruptedly applied by courts of general equity powers down to the present day. The effectiveness, moreover, of the relief thus afforded by the Court of Chancery in England, has been still further enhanced, of late years, by the authority conferred by statute to give compensation in addition to, or in lieu of the remedy by specific performance, as will be seen further on.[2]

362. The reasons for the original growth and subsequent exercise of this equitable remedy are obvious. At common law the general rule was (following the civil-law maxim, *nemo precise cogi ad factum*), to give only pecuniary damages as a redress for all injuries, whether the injury resulted from a refusal to fulfil a contract to deliver property of the defendant, or from a wrongful detention of property of the plaintiff; in other words, whether the action sounded in contract or in tort.[3] Land, indeed, belonging to the plaintiff could be specifically recovered; but a contract to sell real estate could not be specifically enforced by any common-law action.[4] And, so far as personal property was concerned, the rule stated above was subject to but two exceptions, viz., detinue and replevin. But in detinue the defendant could wage his law; and the action of replevin lay only for the taking of goods under a wrongful distress, and did not, in England, reach other cases; although in some of the United States

[1] Kymburley *v.* Goldsmith, Chan. Cal. xx Introduction, p. 11, *ante*. See, also, 1 Spence Eq. 645.

[2] Stat. 21 & 22 Vic., c. 27 (Sir Hugh Cairns's Act); *post*, § 395.

[3] Fry on Specific Performance, §§ 1,

[4] The remedy by action for a breach of the contract in such a case was extremely inadequate; see 1 Sugden V. and P. 542 (8th Am. ed.); *ante*, Introduction, 30.

it has been extended so as to embrace all kinds of wrongful taking of personalty, and in others it has a still more general application, and is used wherever one man claims goods in the possession of another, and seeks to recover them specifically.[1] But the common-law remedy by damages was in many instances manifestly inadequate; for while it was truly said that "one shilling or one sovereign was as good as another,"[2] and that the money which a plaintiff might recover as damages for the non-delivery of a lot of merchandise would enable him to purchase other articles of exactly the same kind and quality, yet this rule is plainly not true in all cases. Thus a particular house or a particular piece of land may have peculiar advantages of location and vicinage, which no other house or piece of land would or could possess, and which no money could, of course, obtain. So, also, there may be many personal chattels which have either a *pretium affectionis*, or a value from some other peculiar cause, and for the loss of which, therefore, pecuniary damages would be an utterly inadequate compensation to the owner; and some cases, moreover, may exist in which it would be entirely impossible to estimate the damages for the detention of property by any known common-law rules.

363. Other reasons, also, exist for invoking the jurisdiction of a chancellor.

At common law one party to a contract cannot complain of a breach on the part of the other, unless he can show his own compliance with the terms of the agreement in every particular. But in equity specific performance may be decreed, although the complainant may not be able to fulfil his contract to the letter, and this is done by entering a decree with compensation for defects.[3] So, too, time is in equity not generally regarded as of the essence of a contract, and failure on the part of the complainant to comply with his covenants on the exact day will not necessarily disentitle him to relief.[4] When to the above is added

[1] 3 Black. Com. 146; Sharswood's note.

[2] Fry on Spec. Perf., § 11. Where a complainant has an effectual remedy in his own hands, chancery will not interfere. The court, for instance, will not enforce the performance of a condition, the non-performance of which would work a forfeiture, for the grantee has fixed his remedy. Woodruff *v.* Water Power Co., 10 N. J. Eq. 489; Marble Co. *v.* Riply, 10 Wal. 359.

[3] Fry on Spec. Perf., § 4.

[4] Id. 739.

the circumstance that equity will decree specific performance of a contract on the ground that it has been already so far performed that it would be inequitable to rescind the same, in many cases in which relief would be denied in a court of law, the advantages of the equitable over the legal remedy, and the reasons for its exercise, can be, perhaps, properly appreciated.[1]

364. From the above general observations it will be perceived that the inadequacy of pecuniary damages or the impossibility of estimating them, form the main grounds upon which the equitable remedy of specific performance may be invoked. It will be convenient to give a few instances of both of these *bases* of chancery jurisdiction.

The remedy of specific performance is most frequently applied to contracts for the sale of real estate. When a binding agreement is entered into to sell land, equity regards the vendor as a trustee of the legal title for the benefit of the vendee, while the latter is looked upon as a trustee of the purchase-money for the benefit of the former.[2] Hence the purchaser has a right to the aid of the chancellor for the purpose of obtaining a conveyance of the legal title to the property of which he is the equitable owner; while, as all remedies ought to be mutual, the vendor can invoke the same aid for the purpose of compelling the buyer to accept a conveyance, and pay the purchase-money.[3] If the

[1] A chancellor will compel a party seeking specific performance to elect between his remedy at law and his bill in equity; Findlay *v.* Keim, 12 P. F. Sm. 117; 2 Daniel's Ch. Prac., § 4.

[2] Richter *v.* Selin, 8 Serg. & R. 425; Kerr *v.* Day, 2 Harris, (Pa.) 114; Brewer *v.* Fleming, 1 P. F. Sm. 113; Napier *v.* Darlington, 20 Id. 64; Finley *v.* Aiken, 1 Grant's Cas. (Pa.) 83; Malin *v.* Malin, 1 Wend. 625; McKechnie *v.* Sterling, 48 Barb. 330; King *v.* Ruckman, C. E. Green, 599; Haughwout *v.* Murphy, 7 Id. 531, 546; McCreight *v.* Foster, L. R., 5 Ch. 612; Shaw *v.* Foster, L. R., 5 H. L. Cas. 321; Earl of Egmont *v.* Smith, L. R., 6 Ch. D. 475. A loss by fire after the contract will fall on the purchaser; Robb *v.* Mann, 1 Jones, (Pa.) 300; McKechnie *v.* Sterling, 48 Barb. 330; Hill on Trustees, 272 (4th Am. ed.); 1 Sug. V. and P. 270, and note (8th Am. ed.); American note to Seton *v.* Slade, 2 Lead. Cas. Eq., part ii. 1041.

[3] Hall *v.* Smith, 14 Ves. 426. This would seem to be the general rule; see Cathcart *v.* Robinson, 5 Peters, 278; Old Colony R. R. *v.* Evans, 6 Gray, 25; Springs *v.* Sanders, Phil. (N. C.) Eq. 67; Hopper *v.* Hopper, 1 C. E. Green, 147; Schroeppel *v.* Hopper, 40 Barb. (N. Y.) 25; Story's Eq., § 725, note. But in Pennsylvania it has been held that under the statute in that state giving the courts power to "afford specific relief where a recovery in damages would be an inadequate remedy," the vendor is not entitled to the aid of a court of equity, where his

contract has been partly performed by the vendee's going into possession or paying the purchase-money,[1] the equity of both parties is, of course, still stronger. Hence it may be said that the circumstance that the contract concerns realty, gives the party a *prima facie* right to come into equity;[2] for it has been justly remarked that where a contract is not objectionable legally, it is as much a matter of course for a court of equity to decree specific performance, as it is for a court of law to give damages.[3] This right, however, is controlled, in particular instances, by other equities presently to be noticed.

The vendor's right to the purchase-money when the vendee has been put in possession *before* conveyance, must not be confounded with his lien for purchase-money *after* conveyance. In one case, the legal estate remains in the vendor; in the other, he has merely a charge on it in the vendee's hands. This distinction has been sometimes overlooked, but is, nevertheless, important.[4]

365. Contracts relating to realty may be enforced not only between the original parties, but also between any persons claiming under them in privity of estate, representation, or title, unless controlling equities have intervened.[5] The personal representatives of the deceased vendor may require a conveyance of the real estate to be made as against the heir of the vendee; and on the other hand, the heir of the vendee is entitled to have

demand is simply to recover the purchase-money, without more; his remedy being an action at law. See Kauffman's App., 5 P. F. Sm. 383; Dech's App., 7 Id. 467, 473. Smaltz's App., 99 Pa. St. 310. But even in Pennsylvania a vendor may file a bill where the decree will not be simply for money payment. Finley *v.* Aiken, 1 Gr. Cas. 83; Dalzell *v.* Crawford, 1 Pars. Eq. 37.

[1] It is not meant to be here asserted that payment of the purchase-money is such a part performance as will take the case out of the statute of frauds; see *infra*, §§ 384, 385.

[2] Specific performance will not be decreed for a tenancy from year to year; Clayton *v.* Illingworth, 10 Hare, 451.

[3] Pomeroy's Eq. § 1402; Richards *v.* Crews, 11 Ore. 501. See, also, Conaway *v.* Sweeney, 24 W. Va. 643; and Ballard *v.* Ballard, 25 W. Va. 763.

[4] See Am. note to Mackreth *v.* Symmons, 1 Lead. Cas. Eq. 289 *et seq.* See, however, Hall *v.* Jones, 21 Md. 439.

[5] Hoddell *v.* Pugh, 33 Beav. 489; Baden *v.* Countess of Pembroke, 2 Vern. 212; Newton *v.* Swazey, 8 N. H. 9; Ewins *v.* Gordon, 49 Id. 444; Moore *v.* Burrows, 34 Barb. 173; Ambrouse *v.* Keller, 22 Grat. 769; Glaze *v.* Drayton, 1 Dess. 109; Hays *v.* Hall, 4 Port. 374; McMorris *v.* Crawford, 15 Alab. 271; Nesbit *v.* Moore, 9 B. Mon. 508; Spangler *v.* Danforth, 65 Ill. 152; Tiernan *v.* Roland, 3 Harris, (Pa.) 429; Laverty *v.* Moore, 33 N. Y. 658; Walker *v.* Kee, 16 S. C. 76; Chambers *v.* Alab. Iron Co., 67 Alab. 353; Fry on Spec. Perf. § 115; 1 Sug. V. & P. 292, 293 (8th Am. ed.).

the personalty of the estate applied to the purchase for his benefit.[1]

Where a contract has been entered into for the sale of property, and that property is afterwards aliened or assigned, or contracted to be aliened or assigned, and the alienee or assignee has notice of the original contract, he is liable to its performance at the suit of the purchaser. If the contract is a binding one, it can be enforced against any party in whom is vested the legal and beneficial interest in the property.[2] On the other hand, if the purchaser assigns the contract, the assignee, upon payment of the purchase-money, can compel the vendor to complete the contract and convey the title to him.[3] But it would seem that it is the duty of the assignee of such a contract to intervene actively, to file a bill, and to claim the benefit of the contract in such a way that the court may have an opportunity of dealing with the rights of all the parties interested. Such was the decision in McCreight *v.* Foster;[4] where an owner of leaseholds (Foster) had contracted to sell them to one Pooley, who paid certain instalments, and afterwards assigned the benefit of the contract to a company. The company gave notice to Foster; but Foster subsequently closed the transaction with Pooley, receiving from him the balance of the purchase-money, and completing the assignment. Pooley afterwards conveyed to a *bona fide* purchaser without notice, and the official liquidators of the company then filed their bill against Foster, claiming that he was liable to make good the loss occasioned by his completion of his contract with Pooley, after he had received notice from the company. It was held by Lord Chancellor Hatherley,

[1] The subject of the performance of contracts of decedents concerning realty is regulated, in most of the United States, by statute. In some instances, however, it is necessary, in spite of these statutory provisions, to resort to a court of chancery. See Wiley's Ex'rs Appeal, 3 Norris, (Pa.) 270.

[2] Daniels *v.* Davison, 16 Ves. 249; 17 Id. 433; Saunders *v.* Cramer, 3 Dr. & W. 99; Barnes *v.* Wood, L. R., 8 Eq. 424; Fenwick *v.* Bulman, L. R., 9 Eq. 165; Fry on Spec. Perf., § 135. See, also, Champion *v.* Brown, 6 Johns. Ch. 398; Muldrow *v.* Muldrow, 2 Dana, 386; Hampson *v.* Edelen, 2 Har. & Johns. 64; Hoagland *v.* Latourette, 1 Green Ch. 254; Haughwout *v.* Murphy, 7 C. E. Green, 547; Langdon *v.* Woolfolk, 2 B. Mon. 105.

[3] Champion *v.* Brown, 6 Johns. Ch 398; Story's Eq., § 788; Sugden V and P. 270 (8th Am. ed.).

[4] L. R., 5 Ch. 604.

reversing the decision of Lord Romilly, M. R., that Foster was not liable. The ground of this decision was that the vendor is not to be considered as a complete trustee of the legal title until the whole purchase-money is paid; and that in the meantime no amount of notice can deprive him of his right to go on and enforce his bargain with the original purchaser.[1]

366. It is no objection to a bill for specific performance that the real estate lies out of the jurisdiction of the court. If the parties are within the jurisdiction, relief can be given, for equity always acts *in personam*.[2] Thus, in Massie *v.* Watts, the Supreme Court of the United States sustained a bill filed in the Circuit Court of Kentucky, to compel a conveyance of land situated in Ohio; while in Penn *v.* Lord Baltimore, Lord Chancellor Hardwicke decreed the specific performance of articles of agreement between the complainant and the defendant, touching the boundaries between the colonies of Pennsylvania and Maryland.[3] This jurisdiction, however, has its limits; and a court will not compel a domestic corporation to go into another State, where it has no corporate existence, and specifically execute a contract in reference to property in the latter jurisdiction.[4]

367. In addition to decreeing the performance of a contract to convey real estate, equity will also lend its aid to the specific enforcement of a covenant for further assurance; although, as a general rule, equity will not specifically enforce covenants for title except in bills *quia timet*, such as bills to remove a cloud from a title, and the like. The enforcement of a covenant for further assurance, however, would seem to rest very much upon the same grounds as the right to enforce the original agreement

[1] See the argument of Sir Roundell Palmer, L. R., 5 Ch. 609; and the opinion of the Chancellor, Id. 612.

[2] Massie *v.* Watts, 6 Cranch, 148; Brown *v.* Desmond, 100 Mass. 267; Cleveland *v.* Burrill, 25 Barb. 532; Burrell *v.* Root, 40 N. Y. 496; Mitchell *v.* Bunch, 2 Paige Ch. 606; Davis *v.* Parker, 14 Allen, 94; Bailey *v.* Ryder, 10 N. Y. 363; Newton *v.* Bronson, 13 Id. 587; Great Falls Manuf. Co. *v.* Worster, 3 Foster, 462; Stephenson *v.* Davis, 56 Maine, 73; Davis *v.* Headley, 7 C. E. Green, 115; Penn *v.* Lord Baltimore, 1 Ves., Sr. 444; 2 Lead. Cas. Eq. 767; *ante*, p. 65; Fry on Spec. Perf., § 60; 1 Sug. V. and P. 305 (8th Am. ed.).

[3] Massie *v.* Watts, 6 Cranch, 148; Penn *v.* Lord Baltimore, 1 Ves., Sr. 444.

[4] Port Royal Railroad Co. *v.* Hammond, 58 Ga. 523; *ante*, p. 65 (note).

to convey; and, therefore, if the purchaser finds that other conveyances are necessary to render his title perfect, and the defect can be supplied by the vendor, he may come into a court of equity and compel the vendor to execute them.[1]

368. In regard to personalty it may be stated, as a general rule, that equity will not decree specific performance of contracts relating to this species of property, for the reason that compensation by way of damages is ordinarily sufficient; although it has been held that the mere circumstance that the bill seeks performance of a contract which relates to personalty, does not render it demurrable.[2] It is obvious, however, that sometimes the detention of chattels cannot be adequately redressed by damages, and in such cases the jurisdiction of equity attaches. Accordingly, contracts for the sale of shares in a particular company[3] (though not, ordinarily, for the sale of stock);[4] for the sale of a life annuity;[5] or for the delivery of chattels which can be supplied by the vendor alone, as ship timber of a particular kind essential to complete a ship; may all be spe-

[1] See Pye *v.* Daubuz, 3 Bro. C. C. 595; Edwards *v.* Appelbee, 2 Id. 652, n.; Smith *v.* Baker, 1 Y. & C. Ch. 223; Gibson *v.* Goldsmid, 5 De G., M. & G., 757 (a case of shares in a gas company); Nelson *v.* Harwood, 3 Call, 342; Davis *v.* Tollemache, 2 Jur. (N. S.) 1181; Fields *v.* Squires, 1 Deady, 366; Rawle on Covenants for Title, 656 *et seq.*; 2 Sug. V. & P. 294 (8th Am. ed.).

[2] Carpenter *v.* Mut. Safety Ins. Co., 4 Sand. Ch. 408; Hebert *v.* Mut. Life Ins. Co., 8 Sawyer C. Ct. 198. See further upon the subject of specific performance of contracts relating to personalty, Mechanics' Bank *v.* Seton, 1 Pet. 299; Phillips *v.* Berger, 2 Barb. 608; McGarvey *v.* Hall, 23 Cal. 140.

[3] Duncuft *v.* Albrecht, 12 Sim. 189; Columbine *v.* Chichester, 2 Ph. 27; Poole *v.* Middleton, 7 Jur. N. S. 1262; Shaw *v.* Fisher, 2 De G. & Sm. 11; Wynne *v.* Price, 3 Id. 310; Ferguson *v.* Paschall, 11 Mo. 267; Brown *v.* Gilliland, 3 Dessaus. 539; Todd *v.* Taft, 7 Allen, 371; White *v.* Schuyler, 1 Abb. (N. Y.) Pr. R. N. S. 300; Treas. *v.* Commercial Co., 23 Cal. 390; True *v.* Houghton, 6 Col. 318; Ashe *v.* Johnson, 2 Jones Eq. 149. A bill for specific performance will be entertained when its object is to obtain the delivery of certificates of stock which confer the legal title to it; Doloret *v.* Rothschild, 1 Sim. & Stu. 590; Pooley *v.* Budd, 14 Beav. 34.

[4] Ross *v.* Union Pac. Rd., 1 Woolw. 26; Fallon *v.* Railroad, 1 Dill. 121; Cud *v.* Rutter, 1 P. Wms. 570; Foll's Appeal, 91 Pa. St. 437; I Lead. Cas. Eq. 1096 (4th Am. ed.). The distinction (in England) is between public *stock* (governments) and *shares* in private corporations. In this country shares of companies, when they can be readily obtained, and when they have a market value which can be as certainly ascertained as that of government securities, are put upon the same footing as public stocks: Ross *v.* U. P. Rd., *supra;* and Ashe *v.* Johnson, *supra*, note 3. See 22 Am. L. Reg. 489.

[5] Withy *v.* Cottle, 1 Sim. & Stu. 174.

cifically enforced.[1] The relief in cases of personalty has also been frequently applied where articles of peculiar value have been tortiously withheld. Such is the case of the famous Pusey Horn, which had from time immemorial gone along with the plaintiff's estate, and whereby the said estate was held;[2] of the altar piece, part of the estate of the Percys, and to which the Duke of Somerset had become entitled as treasure trove;[3] and in more modern times, of the instruments, maps and plans of a surveyor, which were withheld from him by a clerk in his employment,[4] of title papers to a foreign estate,[5] and of the evidences of choses in action wrongfully detained from the party legally entitled to their custody.[6] Bills were, also, not unfrequently entertained in the Southern States for the specific delivery of domestic slaves.[7]

It may also be mentioned in this connection that where the contract or duty concerning personal chattels amounts to a trust, the performance of such a duty will be specifically enforced, no matter what the nature of the particular property may be.[8]

369. Courts of equity may also enforce specific performance of contracts of personalty where the damages in money cannot be *ascertained*. An instance in this rule may be found in the case of Adderly *v.* Dixon, where the contract was for the sale of debts proved under two commissions of bankruptcy, and specific performance was granted on the ground that to compel the plaintiff to accept damages would be in effect to make him sell the dividends, which were of unascertained value, at a conjectural price.[9]

370. Other contracts besides those of sale may be decreed to be specifically performed. Thus performance has been decreed in the case of agreements to insure (and this, too, even after a

[1] Buxton *v.* Lister, 3 Atk. 383; Fry on Spec. Perf., § 33.

[2] Pusey *v.* Pusey, 1 Vern. 273; 1 Lead. Cas. Eq. 820.

[3] Duke of Somerset *v.* Cookson, 3 P. Wms. 389; 1 Lead. Cas. Eq. 821.

[4] McGowin *v.* Remington, 2 Jones, (Pa.) 56; Beasley *v.* Allyn, 15 Phila. 97; Falcke *v.* Gray, 4 Drewry, 651.

[5] Patteson *v.* Skillman, 34 N. J. Eq. 344.

[6] Gough *v.* Crane, 3 Md. Ch. D. 119.

[7] Sarter *v.* Gordon, 2 Hill Ch. 121; Young *v.* Burton, 1 McMul. Eq. 255; Summers *v.* Bean, 13 Grat. 404; Fry on Spec. Perf. 55 (2d Am. ed.), note; note to Cuddee *v.* Rutter, 1 Lead. Cas. Eq. 786.

[8] Cowles *v.* Whitman, 10 Conn. 121; Johnson *v.* Brooks, 93 N. Y. 337.

[9] Adderley *v.* Dixon, 1 Sim. & Stu. 607. See, also, Sullivan *v.* Tuck, 1 Md. Ch. 59; Waters *v.* Howard, Id. 112; Finley *v.* Aiken, 1 Grant, (Pa.) 83.

loss);[1] to receive certain goods in payment of a debt;[2] to divide chattels which formed the assets of a firm among the partners;[3] to compromise a suit;[4] to build;[5] to plant trees furnished by the plaintiff under a promise that the defendant would set them out on his farm, send them to market, and render an account of the profits;[6] to pay in coin;[7] to give a promissory note in place of one which was destroyed;[8] to assign a patent;[9] or to renew a license.[10] In short, an agreement will be enforced specifically in a court of equity where the specific thing or act contracted for, and not mere pecuniary compensation, is the redress practically required;[11] and in such cases, subject to the limitations which are to be stated, it may be said that it is as much a matter of course for a court of chancery to decree specific performance of a contract, as it is for a court of law to give damages for its breach.[12]

Courts of equity also have jurisdiction to enforce the specific performance of awards, the jurisdiction being assumed on the ground that such performance is an execution of the agreement of parties as fixed by the arbitrators. Hence a chancellor will decree a specific performance of an award, following a proper submission, by which the conveyance of real estate, or the doing of anything else *in specie*, is provided for, in the same way as of a contract in the same form and effect. This is the rule laid

[1] Tayloe *v.* Merchants' Ins. Co., 9 How. 390; Carpenter *v.* Mutual Safety Ins. Co., 4 Sandf. Ch. 408.

[2] Very *v.* Levy, 13 How. 346.

[3] Kirksey *v.* Fike, 27 Ala. 383.

[4] Dawson *v.* Newsome, 6 Jur. N. S. 625.

[5] Storer *v.* Great West. Rd. Co., 2 Y. & Ch. 48; Stuyvesant *v.* The Mayor, 11 Paige, 414.

[6] McKnight *v.* Robbins, 1 Halst. Ch. 229.

[7] Hall *v.* Hiles, 2 Bush, 532.

[8] McMullen *v.* Vanzant, 73 Ill. 190.

[9] Binney *v.* Annan, 107 Mass. 94; Satterthwait *v.* Marshall, 4 Del. Ch. 337; Runstetter *v.* Atkinson, 4 McArth. 382.

[10] Domestic Tel. & Telph. Co. *v.* Metropolitan Co., 39 N. J. Eq. 160.

[11] The insertion of a penalty for noncompliance with a contract as "liquidated damages" will not deprive a party of his right to specific performance. Hull *v.* Sturdivant, 46 Maine, 34; Hooker *v.* Pynchon, 8 Gray, 550; Moorer *v.* Kopmann, 11 Rich. Eq. 252; Chamberlain *v.* Blue, 6 Blackf. (Ind.) 491; Daily *v.* Litchfield, 10 Mich. 38. See Dowling *v.* Betjemann, 2 Johns. & H. 544; Gillis *v.* Hall, 2 Brewster, (Pa.) 342; *ante*, p. 234.

[12] Hopper *v.* Hopper, 16 N. J. Eq. 147; Rogers *v.* Saunders, 16 Me. 92; Chance *v.* Beall, 20 Ga. 143; Johnson *v.* Rickett, 5 Cal. 218; St. Paul Division *v.* Brown, 9 Minn. 157; Love *v.* Watkins, 40 Cal. 547; North Georgia Mining Co. *v.* Latimer, 51 Ga. 47.

down by the English authorities,[1] and it has been followed by American decisions.[2]

371. While, as we have just seen, equity will grant specific performance in all cases where the dispensation of exact justice would seem to require it; yet, on the other hand, it has been found necessary to circumscribe the exercise of this delicate and effective power by certain limitations. Specific performance is usually said to rest in the "discretion" of the chancellor.[3] This discretion, however, is a *judicial* discretion. It is not a mere arbitrary will, but is subject to certain definite and well-ascertained rules, within which its play is confined.[4] "I have unlimited power," said Sir George Jessel, M. R., referring to the analogous case of Injunctions, "to grant an injunction where it would be right or just to do so; and what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal principles."[5] What are the rules according to which these legal reasons are enforced and by which these legal principles are applied, must now be noticed.

372. And in the first place, it is a fundamental principle that the extraordinary remedy of specific performance will not be administered save upon an application which is based on a valuable consideration.[6] The reason of this is obvious. The general ground for the relief is the inadequacy of damages. There can, of course, be no legal injury sustained, and, therefore

[1] Blundell *v.* Brettargh, 17 Ves. 241; Story's Eq. Jur., § 1458.

[2] MacNeil *v.* Magee, 5 Mason, 244; Jones *v.* Boston Mill Corp., 4 Pick. 507; Wood *v.* Shepherd, 2 Patton & H. 442; Whitney *v.* Stone, 23 Cal. 275; Story *v.* Norwich Rd., 24 Conn. 94; note to Cuddee *v.* Rutter, 1 Lead. Cas. Eq., 1105 (4th Am. ed.).

[3] Joynes *v.* Statham, 3 Atk. 388; Seymour *v.* Delancey, 6 Johns. 222; Blackwilder *v.* Loveless, 21 Ala. 371; Waters *v.* Howard, 8 Gill, 262; Auter *v.* Miller, 18 Ia. 405; Smoot *v.* Rea, 19 Md. 398; Tobey *v.* Bristol, 3 Story, 800; Pickering *v.* Pickering, 38 N. H. 400; Willard *v.* Tayloe, 8 Wal. 557; Oil Creek Rd. *v.* Atlantic & G. W. Rd., 7 P. F. Sm. 65; St. John *v.* Benedict, 6 Johns. 111; Sherman *v.* Wright, 49 N. Y. 231; Quinn *v.* Roath, 37 Conn. 16; McComas *v.* Easley, 21 Grat. 23; Godwin *v.* Collins, 4 Houst. 54; Cox *v.* Middleton, 2 Drewry, 209; Rennyson *v.* Rozell, 106 Pa. St. 407; Godwin *v.* Collins, 3 Del. Ch. 189; Shenandoah Val. Rd. *v.* Lewis, 76 Va. 833; Pendleton *v.* Dalton, 92 N. C. 185.

[4] Henderson *v.* Hays, 2 Watts, 148; King *v.* Morford, Sax. (N. J.) 274; Griffith *v.* Bank, 6 G. & J. 424; Leigh *v.* Crump, 1 Ired. Eq. 299.

[5] Beddon *v.* Beddon, 9 Ch. Div. 89.

[6] Lear *v.* Chouteau, 23 Ill. 39; Smith *v.* Phillips, 77 Va. 548; Roney *v.* Moss, 74 Alab. 390. Except that, where a voluntary agreement has been actually executed, equity will enforce all rights growing out of it; Wyche *v.* Greene, 16 Ga. 49; Read *v.* Long, 4 Yerg. 68.

no question of adequacy or inadequacy of damages, in cases where no valuable consideration exists, and no pecuniary loss has consequently been suffered. Equity will not, therefore, interfere to enforce the specific performance of a *gift*.[1] If, indeed (it must always be remembered), the gift has assumed such a definite and complete shape, that it is entitled to be considered a trust, the performance of this trust will be enforced. But this is on entirely different grounds; and the distinction between the two cases is clearly and thoroughly established. If A. makes a gift unaccompanied by delivery, it is simply an incomplete gift, and cannot be enforced against the will of the donor. But if A. constitutes himself trustee of a chattel for the benefit of B., B. certainly can enforce the trust, and this in opposition to A. In other words, equity will not make a man a trustee for the benefit of a mere volunteer; but if the man constitutes himself a trustee, equity will enforce the trust.[2]

373. It is essential to specific performance that the consideration should be *valuable;* a merely *good* consideration, such as natural love and affection, or the performance of a moral duty, will not be sufficient.[3]

Moreover, it is necessary that the consideration shall be actual. A constructive consideration, such as that imported by the seal to a bond, will not do.[4]

374. In some cases the *adequacy* of the consideration has been inquired into. It has been seen in a former chapter that mere inadequacy of consideration is not sufficient, as a general rule, to set a transaction aside;[5] and the same rule is also true in cases where specific performance is asked for; and relief will not usually be refused on that ground alone.[6] But cases may

[1] Shepherd *v.* Shepherd, 1 Md. Ch. 244; Holland *v.* Hensley, 4 Iowa, 222; Buford *v.* McKee, 1 Dana, (Ky.) 107; Studer *v.* Seyer, 67 Ga. 125.

[2] *Ante*, p. 102 *et seq.*, and cases cited. See, in this connection, Halsey *v.* Peters, 79 Va. 60.

[3] Jefferys *v.* Jefferys, Cr. & P. 138; Moore *v.* Crofton; 3 Jones & Lat. 442; Kennedy *v.* Ware, 1 Barr, 445; Morris *v.* Lewis, 33 Ala. 53; Keffer *v.* Grayson, 76 Va. 517. See, however, Taylor *v.* James, 4 Dess. 5; McIntire *v.* Hughes, 4 Bibb, 186; Caldwell *v.* Williams, 1 Bailey Eq. 175; Hayes *v.* Kershow, 1 Sandf. Ch. 261. See *ante*, p. 108.

[4] Adams's Doct. Eq. 78.

[5] *Ante*, p. 276.

[6] Lee *v.* Kirby, 104 Mass. 420; Erwin *v.* Parham, 12 Howard, 197; Hale *v.* Wilkinson, 21 Grat. 75; 1 Sug. V. and P. 421 (8th Am. ed.); Borell *v.* Dann, 2 Hare, 440. This is particularly true of speculative purchases, *e. g.*, of mines. Haywood *v.* Cope, 25 Beav. 140.

occur in which the court will exercise its discretion, and will refuse to lend the aid of the chancellor to the enforcement in specie of a hard and unreasonable bargain.[1]

375. In the second place, a party seeking specific performance must not only be a claimant for value, but he must also show that damages would not afford an adequate compensation. Hence, if a money payment will constitute a sufficient redress, a chancellor will not interfere.[2] This is the reason for the difference between the rule in regard to specific performance of contracts relating to realty, and those concerning personalty.[3] For the distinction is not founded upon the nature of the property, but upon the fact that in one case damages in money would not operate to give a party the full measure of redress which he ought to have; whereas in most cases of personalty, to give a man a money equivalent, is as good as giving him the thing itself.[4] For the same reason in some exceptional cases, specific performance will, as we have seen, be decreed as to personalty; because in such cases the redress by damages would be inadequate.

376. In the third place, it must be remembered that the juris-

[1] Osgood *v.* Franklin, 2 Johns. Ch. 23; 14 Johns. 527; Howard *v.* Edgell, 17 Verm. 9; Shepard *v.* Bevin, 9 Gill, 32; Harrison *v.* Town, 17 Missouri, 237; Moon *v.* Crowder, 72 Alab. 79; Powers *v.* Hale, 5 Foster, 145; Fackle *v.* Gray, 4 Drewry, 651. See, also, Willard *v.* Tayloe, 8 Wallace, 557, stated *ante*, p. 62. Some curious cases upon the subject of adequacy of consideration have arisen in the Southern States, under contracts made during the war of 1861–5, for the purchase of real estate in Confederate currency, and which have been sought to be enforced after the termination of the war, when the confederate money had become worthless. It was held that as the consideration was adequate at the time of the contract, the court would decree specific performance. Hale *v.* Wilkinson, 21 Grat. 75; Ambrouse *v.* Keller, 22 Id. 769; Talley *v.* Robinson, Id. 888. These decisions were properly based upon the ruling of the Supreme Court of the United States in Thorington *v.* Smith, 8 Wal. 1, and Delmas *v.* Insurance Co., 14 Id. 665, that the notes of the confederacy actually circulating as money at the time the contract was entered into constitute a valid consideration for such contract.

[2] Johnson *v.* Rd. Co., 19 Eng. L. and Eq. 584; Richmond *v.* Rd. Co., 33 Ia. 439; Phyfe *v.* Wardell, 2 Edw. Ch. 47; Penna. Co. *v.* Delaware, &c., Co., 31 N. Y. 91.

[3] See Hall *v.* Warren, 9 Ves. 605; Harnett *v.* Yielding, 2 Sch. & Lef. 553; Finley *v.* Aiken, 1 Grant's Cas. (Pa.) 83; notes to Cuddee *v.* Rutter, 1 Lead. Cas. Eq. 746 (3d Am. ed.).

[4] See remarks of Sir J. Leach, V. C., in Adderly *v.* Dixon, 1 Sim. & Stu. 607.

diction to enforce specific performance is always exercised subject to general equitable considerations, and will not be applied to cases where the complainant does not come in with clean hands, or where equities exist on the other side, which would render it unjust to grant the relief.[1] Thus, if the complainant has been guilty of negligence and *laches*,[2] or has shown a backwardness in fulfilling the contract on his part;[3] or where the contract is hard and destitute of all equity;[4] or is oppressive on the defendant;[5] or which is illegal, immoral or against public policy;[6] or the condition of things has materially changed;[7] or there is a substantial defect in the complainant's title not remediable before decree; or the title of the complainant is doubtful or one that would involve the defendant in litigation; or there has been any misrepresentation or mistake;[8] or the contract is founded on imposition;[9] or is made by an agent in a manner not author-

[1] See McDavit *v.* Pierrepoint, 8 C. E. Green, 45, 46; Pinner *v.* Sharp, Id. 274; Backus's Appeal, 8 P. F. Sm. 186; Canterbury Aqueduct Co. *v.* Ensworth, 22 Conn. 608; Hetfield *v.* Willey, 105 Ill. 286; Rennyson *v.* Rozell, 106 Pa. St. 407.

[2] Cadwalader's Appeal, 7 P. F. Sm. 158; Whitaker *v.* Robinson, 65 Ill. 411; Smith *v.* Sheldon, Id. 219; Hallesy *v.* Jackson, 66 Id. 139; McCabe *v.* Crosier, 69 Id. 501; McLaurie *v.* Barnes, 72 Id. 73; Dragoo *v.* Dragoo, 50 Mich. 573. But not where the default has been simply in collateral contract; Stewart Metcalf, 68 Ill. 109.

[3] Rose *v.* Swann, 56 Ill. 40; Iglehart *v.* Gibson, Id. 81; Cronk *v.* Trumble, 66 Id. 428; Hoyt *v.* Tuxbury, 70 Id. 331; Miller *v.* Henlan, 1 P. F. Sm. 265; Rogers *v.* Williams, 28 Leg. Int. 341; Kinney *v.* Redden, 2 Del. Ch. 46; Hubbell *v.* Von Schoening, 49 N. Y. 326; Finch *v.* Harker, Id. 1; Babcock *v.* Emrick, 64 How. (N. Y.) Pr. R. 435; Crane *v.* Decamp, 6 C. E. Green, 420; Holgate *v.* Eaton, 116 U. S. 33; Ewing's Appeal, 18 Week. N. Cas. 29.

[4] King *v.* Hamilton, 5 Pet. 211; Western Rd. *v.* Babcock, 6 Met. 346; Backus's App., 9 P. F. Sm. 186; Ludlam *v.* Buckingham, 39 N. J. Eq. 563.

[5] Wedgwood *v.* Adams, 6 Beav. 600; Webb *v.* London & Portsmouth Rd. Co., 1 De G., M. & G. 521; Bowl s *v.* Woodson, 7 Grat. 78. Particularly if it has become more onerous through the delay of the complainant; Andrews *v.* Bell, 6 P. F. Sm. 350; Wonson *v.* Fenno, 129 Mass. 405.

[6] Dumont *v.* Dufore, 27 Ind. 263; Evans *v.* Kittrell, 33 Ala. 449; Marsh *v.* Fairbury & N. Rd., 64 Ill. 414; Foll's Appeal, 91 Pa. St. 437.

[7] Peters *v.* Delaplaine, 49 N. Y. 362; Booten *v.* Scheffer, 21 Grat. 474; Miller *v.* Henlan, 1 P. F. Sm. 265; Kimball *v.* Tooke, 70 Ill. 553.

[8] Malins *v.* Freeman, 2 Keen, 25; Colyer *v.* Clay, 7 Beav. 188; Bruck *v.* Tucker, 42 Cal. 346; Jones *v.* Clifford, L. R., 3 Ch. D. 779; Holmes's Appeal, 27 P. F. Sm. 50; Miles *v.* Stevens, 2 Barr, 37; Smith *v.* Sturgess, 65 How. (N. Y.) Pr. R. 360.

[9] Fish *v.* Leser, 69 Ill. 394; Brady's Appeal, 16 P. F. Sm. 277; Piersol *v.* Neill, 13 Id. 420.

ized by the principal;[1] or will involve a breach of trust;[2] or it is not clear that the minds of the parties have come together;[3] in all of the above cases specific performance will be refused.

377. The other circumstances, in addition to those already mentioned, which usually influence the discretion of a chancellor in decreeing or refusing specific performance, are that the agreement must be *mutual*, that its terms must be *certain*, and that its enforcement by the courts must be *practicable*. Equity will not decree the specific performance of a unilateral contract.[4] Thus a *feme covert* cannot obtain specific performance of a contract which is not binding on her;[5] and the rule is the same as to an infant.[6] Again, the terms of an agreement must be certain. It was one of the rules laid down by Lord Rosslyn in Walpole *v.* Orford, that "all agreements in order to be executed in this court must be certain and defined;"[7] and the law as thus stated is well settled both in England and in this country,[8] having been recognised in many cases in nearly all the states of the Union.[9] This rule is, however, subject to two qualifications:

[1] Daniel *v.* Adams, Ambler, 495; and see Proudfoot *v.* Wightman, 78 Ill. 553; and Weise's App., 22 P. F. Sm. 351.

[2] Morlock *v.* Buller, 10 Ves. 292; 2 L. Ca. Eq. 484, note to Woollam *v.* Hearn.

[3] Wistar's App., 30 P. F. Sm. 484. See Brown *v.* Brown, 33 N. J. Eq. 650.

[4] Marble Company *v.* Ripley, 10 Wal. 339; Bronson *v.* Cahill, 4 McLean, 19; Tyson *v.* Watts, 1 Maryl. Ch. 13; Benedict *v.* Lynch, 1 Johns. Ch. 370; Bodine *v.* Glading, 9 Harris, (Pa.) 50; Corson *v.* Mulvany, 13 Wright, 88; Jones *v.* Noble, 3 Bush, 694; Ewins *v.* Gordon, 49 N. H. 444; McMurtrie *v.* Bennett, Harrington Ch. (Mich.) 124; Hawley *v.* Sheldon, Id 420; Hutcheson *v.* McNutt, 1 Ohio, 14; Benedict *v.* Lynch, 1 Johns. Ch. 370; Sutherland *v.* Parkins, 75 Ill. 338; Meason *v.* Kaine, 13 P. F. Sm. 340.

[5] Richards *v.* Green, 8 C. E. Green, 536; Pinner *v.* Sharp, Id. 274. When a feme covert has made a valid contract for the sale of her real estate in accordance with the formalities prescribed by law, she may be decreed to perform it specifically; Dankel *v.* Hunter, 11 P. F. Sm. 382.

[6] Flight *v.* Bolland, 4 Russ. 298; and specific performance of an agreement to sell real estate will not be decreed against a vendor whose wife refuses to join in the conveyance, unless, indeed, the vendee is willing to pay the full purchase-money, and accept the deed of the vendor without his wife joining; Riesz's Appeal, 23 P. F. Sm. 490; Burk's Appeal, 25 Id. 141; Reilly *v.* Smith, 10 C. E. Green, 158. See, also, Yost *v.* Devault, 9 Iowa, 50. But a contract in which one party has an *option* to buy, is not so devoid of mutuality as to prevent a court of equity from decreeing its specific performance; Corson *v.* Mulvany, 13 Wright, 88; Smith & Fleck's Appeal, 19 P. F. Sm. 480.

[7] 3 Ves. 420. See Pearce *v.* Watts, L. R., 20 Eq. 492.

[8] See Fry on Specific Performance, § 203 *et seq.*, and § 229 *et seq.*

[9] Dodd *v.* Seymour, 21 Conn. 476;

first, that specific performance will not be refused if the uncertainty is owing to the fault of the defendant;[1] and, secondly, that in obedience to the maxim, *id certum est quod certum reddi potest*, performance will be decreed if the means of ascertaining the contract are at hand.[2]

A court of chancery, moreover, will not decree the specific performance of a contract, where it would be impossible for the court to enforce the execution of its decree, or where the literal performance if enforced would be a vain and idle act. Thus, a court will not attempt to enforce a contract to work the line of a railway company, and keep its engines and rolling stock in order, for it would be out of the power of the court to see that such a contract was carried out;[3] and a contract to convey real estate of which the vendor has no title will not be decreed, for such a decree would be simply nugatory.[4] The performance of the contract, in short, must not be impracticable.[5]

Waring *v.* Ayres, 40 N. Y. 357; King *v.* Ruckman, 5 C. E. Green, 316; Nichols *v.* Williams, 7 Id. 65; Parrish *v.* Koons, 1 Pars. Eq. 97; Hammer *v.* McEldowney, 10 Wright, (Pa.) 334; Canton Co. *v.* The Railroad Co., 21 Maryl. 395; Aday *v.* Echols, 18 Alab. 353; Maderia *v.* Hopkins; 12 B. Monr. 595; Munsell *v.* Loree, 21 Mich. 491; Baldwin *v.* Kerlin, 46 Indiana, 426; Colson *v.* Thompson, 2 Wheat. 336; Kendall *v.* Almy, 2 Sumn. 278; Minturn *v.* Baylis, 33 Cal. 129; Huff *v.* Shepard, 58 Mo. 242; Burkmaster *v.* Thompson, 36 N. Y. 558; Jordan *v.* Deaton, 24 Ark. 704; Matthews *v.* Jarrett, 20 W. Va. 415; Breard *v.* Munger, 88 N. C. 297; Preston *v.* Stuart, 5 Rep. 100 (Sup. Ct. U. S.).

[1] Pritchard *v.* Ovey, 1 J. & W. 396; Ld. Kensington *v.* Phillips, 5 Dow, 61.

See Walker *v.* The Eastern Counties Railway, 6 Hare, 594; Laird *v.* The Birkenhead Railway Co., Johns. Ch. 501; Smith *v.* Peters, L. R., 20 Eq. 511; Dike *v.* Green, 4 R. Island, 285; Van Doren *v.* Robinson, 1 C. E. Green, 256; Prater *v.* Miller, 3 Hawks, 628; Johnson *v.* Conger, 14 Abb. (N. Y. Pr.) 195; Fry on Specific Performance, § 207.

[3] Johnson *v.* Shrewsbury and Birmingham Railway Co., 3 De G., M. & G. 914. See, also, Blackett *v.* Bates, L. R., 1 Ch. 117; Port Clinton R. R. Co. *v.* The Cleveland & Toledo Rd., 13 Ohio N. S. 544; Buck *v.* Smith, 29 Mich. 171; Blanchard *v.* Detroit, Lansing & Lake Mich. Rd., 31 Id. 45; Marble Company *v.* Ripley, 10 Wallace, 339 (where the rules upon this subject are laid down by the Supreme Court of the United States); Ross *v.* The Union Pacific Rd., 1 Woolw. 26; Fallon *v.* Railroad Co., 1 Dill. 121; Mastin *v.* Halley, 61 Mo. 201; Beck *v.* Allison, 56 N. Y. 368. And where the specific performance of the contract would be impracticable the complainant, of course, cannot gain his end by seeking it in the form of an injunction against the breach of the contract; Pullman Car Co. *v.* Tex. & Pac. Rd., 4 Woods C. Ct. 317.

[4] Fitzpatrick *v.* Featherstone, 3 Ala. 40; Woodward *v.* Harris, 2 Barb. 459.

[5] The exercise of the discretion of Courts of Equity as to decreeing spe-

But, on the other hand, if it be within the power of the court to supervise the performance of the contract, and the equities which justify its specific enforcement exist, the agreement will be enforced. The decree in any given cause, therefore, must depend largely upon the features of the particular case, as well as upon the general rules now under consideration.[1]

378. It is a settled and invariable rule that a purchaser shall not be compelled, by a decree of a court of equity in a suit for specific performance, to accept a doubtful title. It has been said that the title which a purchaser is compellable to take ought, like Cæsar's wife, to be free even from suspicion;[2] although in some cases the rule has not been enforced with quite that degree of strictness. Thus, in Beioley *v.* Carter,[3] a purchaser was compelled to take a title which appeared good to the Court of Appeals, although the judge of the court below had been of a different opinion; and in Dalzell *v.* Crawford[4] it was said that adverse opinions of conveyancers and counsel did not constitute a sufficient ground for refusing a decree. But the general current of authority is undoubtedly against forcing upon a purchaser any title as to which there may be the slightest doubt or suspicion;[5] although it is difficult to extract from the decisions

cific performance is in many of the States controlled very much by the language of the statutes conferring chancery jurisdiction. See Jones *v.* Newhall, 115 Mass. 244, where the subject is carefully examined, and the rules as to the jurisdiction of the courts and its exercise are explained. See, also, in this connection, §§ 37 and 200, *ante*, and authorities there cited. Examine also Cutting *v.* Dana, 10 C. E. Green, 265 (a bill to enforce the assignment of a debt), where the subject is learnedly discussed. See, also, Sturgis *v.* Galindo, 59 Cal. 28.

[1] See Lawrence *v.* Saratoga Lake Rd., 36 Hun, 407, where specific performance of an agreement to build a bridge and railroad station was decreed after part construction. See, also, Equitable Gas Light Co. *v.* Balt. Coal Tar Co., 63 Md. 285.

[2] 1 Sug. V. and P. 577 (8th Am. ed.).

[3] L. R., 4 Ch. 230. See Collier *v.* McBean, L. R., 1 Ch. 81.

[4] 1 Pars. Eq. (Pa.) 37.

[5] Pyrke *v.* Waddingham, 10 Hare, 1; Mullings *v.* Trinder, L. R., 10 Eq. 449; Rogers *v.* Waterhouse, 4 Drewry, 329; Hepburn *v.* Dunlop, 1 Wheat. 179; Richmond *v.* Gray, 3 Allen, 25; Sturtevant *v.* Jaques, 14 Allen, 523; Chambers *v.* Tulane, 1 Stockt. 146; Young *v.* Rathbone, 1 C. E. Green, 224; Swayne *v.* Lyon, 17 P. F. Sm. 436; Swain *v.* The Fidelity Ins. Co., 4 Id. 455; Freetly *v.* Barnhart, 1 Id. 279; Speakman *v.* Forepaugh, 8 Wright, (Pa.) 363; Pratt *v.* Eby, 17 P. F. Sm. 396–404; Herzberg *v.* Irwin, 92 Pa. St. 48; Griffin *v.* Cunningham, 19 Grat. 571; Owings *v.* Baldwin, 8 Gill, 337; Voorhees *v.* De Meyer, 3 Sandf. Ch. 614; Sebring *v.* Mersereau, 9

any rule which can always be applied. "To force a title on a purchaser," says the Vice-Chancellor, in Rogers *v.* Waterhouse, "the opinion of the court in favor thereof must be so clear that it cannot be apprehended that another judge may form a different opinion."[1]

379. Pyrke *v.* Waddingham[2] may probably be considered the leading case upon this subject in England. The proposition was there laid down that a doubtful title which a purchaser will not be compelled to accept, is not only a title upon which the court entertains doubt, but includes also a title which, although the court has a favorable opinion of it, yet may reasonably and fairly be questioned, in the opinion of other competent persons; for the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favor of the title should turn out not to be well founded. If the doubts as to a title arise upon a question connected with the general law, the court is to judge whether the general law upon the point is or is not settled; and if it be not, or if the doubts as to the title may be affected by extrinsic circumstances, which neither the purchaser nor the court can satisfactorily investigate, specific performance will be refused. These propositions have been adopted as correct statements of the law upon this subject in the case of Mullings *v.* Trinder, decided in 1870.[3]

380. A mere *possibility* of an adverse claim is not sufficient to render a title doubtful,[4] nor a mere pecuniary charge, if the purchaser can be protected against it.[5] And if the decree can

Cowen, 344; People *v.* Stock Brokers' Building Co., 92 N. Y. 98; Butler *v.* O'Hear, 1 Dessaus. 382; Thompson *v.* Dulles, 5 Rich. Eq. 370; Laurens *v.* Lucas, 6 Rich. Eq. 217; Hoyt *v.* Tuxbury, 70 Ill. 331; Page *v.* Greely, 75 Id. Id. 400; Smith *v.* Turner, 50 Ind. 372; Lewis *v.* Herndon, 3 Litt. 358; Kelly *v.* Bradford, 3 Bibb, 317; Fitzpatrick *v.* Featherstone, 3 Ala. 40.

[1] Rogers *v.* Waterhouse, 4 Drew. 329.

[2] 10 Hare, 1.

[3] L. R., 10 Eq. 449. Singular to say, in this case, Lord Romilly, M. R., while approving of the rules laid down by (then) Vice-Chancellor Turner in Pyrke *v.* Waddingham, refused to follow that decision under exactly similar circumstances. A collection of examples of titles which have been held good and those which have been held bad or doubtful will be found in Watson's Compendium of Equity, 1040, 1041.

[4] Hillary *v.* Waller, 12 Ves. 252. See, also, Vreeland *v.* Blauvelt, 8 C. E. Green, 483.

[5] Tiernan *v.* Roland, 3 Harris, (Pa.) 441; Thompson *v.* Carpenter, 4 Barr, 132.

provide for the vesting of a good title in the purchaser he will be compelled to accept it.[1]

It may be added here that it has been decided that a court of equity will decree specific performance if the vendor is able to make a good title at any time before final decree.[2] But this doctrine will not be carried to the extent of holding that a vendor is entitled to specific performance if he had *no* title at the date of the contract, although he may have subsequently acquired one; for one who speculates upon that which is not within his control is not a *bona fide* contractor, and there is no mutuality between the parties.[3]

When a vendor has a defective title the vendee may, if he chooses to rely upon the covenants for title, compel the specific performance of the contract.[4]

But where the vendor has *no* title, the vendee cannot compel a conveyance, for that would be to decree the performance of an unlawful act.[5]

381. It was (and is) a well-established rule in England that specific performance of a written contract with a parol variation will not be enforced. What is meant by this rule is this: The ordinary principle of evidence in regard to contracts which have been reduced to writing, is that the intention of the parties is to be gathered solely from the written agreement, and that no evidence can be admitted to show any verbal qualification of the writing. Cases of fraud or mistake formed, as we have seen, exceptions to this rule.[6] It has also been observed, in the preceding pages, that equity would not lend its aid to the enforcement of a contract into which a party had been induced to enter by misrepresentation or mistake. Hence, if from these causes a material stipulation had been omitted from an agree-

[1] Doebler's Appeal, 14 P. F. Sm. 9.

[2] Hepburn *v.* Dunlop, 1 Wheat. 179; Baldwin *v.* Salter, 8 Paige, 473; Graham *v.* Hackwith, 1 Marsh. 423; Tyree *v.* Williams, 3 Bibb, 365; Seymour *v.* Delancey, 3 Cowen, 445; Moss *v.* Hanson, 5 Harris, (Pa.) 379; Tiernan *v.* Roland, 3 Id. 429; Richmond *v.* Gray, 3 Allen, 25; Luckett *v.* Williamson, 37 Mo. 388; Fraker *v.* Brazelton, 12 Lea (Tenn.) 278; Murrell *v.* Goodyear, 1 De G., F. & J. 432.

[3] Forrer *v.* Nash, 35 Beav. 167; Wilson *v.* Williams, 3 Jur. N. S. 810; Tiernan *v.* Roland, 3 Harris, (Pa.) 429; Moss *v.* Hanson, 5 Id. 379; Fry on Spec. Perf., § 875. But see Mortlock *v.* Buller, 10 Ves. 315.

[4] Harding *v.* Parshall, 56 Ill. 227.

[5] Chartier *v.* Marshall, 51 N. Hamp. 400. See Adams' Eq. 80, 81.

[6] *Ante*, p. 253.

ment, or the agreement did not express the real intention of the parties, parol evidence to establish that such was the case was admissible on behalf of the defendant, and constituted a good defence to the complainant's bill. But then the question occurred—ought equity to go one step further? Suppose a written contract had been drawn and executed, which by reason of some mistake or deceit did not properly express the intention of the parties; could the complainant show, by parol evidence, what the contract actually was, and then have a decree for the specific performance of the written agreement as modified by the parol evidence? In England this question was answered in the negative. The distinction is there well established between a party seeking, and one resisting specific performance—parol evidence to vary a written instrument being admissible in the latter case, and not in the former.

The difference between a plaintiff seeking and a defendant resisting specific performance is well illustrated by the case of Townshend *v.* Stangroom,[2] in which both parties to a contract to lease filed bills, one to have the contract enforced as it was written, the other to have it carried out as modified by parol. Lord Eldon dismissed both bills; the first, because parol evidence was admissible on behalf of the defendant, the second because evidence of the same kind was not admissible on behalf of the complainant; and this distinction has been always recognised.[3]

382. In this country, however, although there has been some conflict of authority, the better opinion, perhaps, is that the English rule ought not to be strictly followed, but that in proper cases of fraud or mistake, a party ought to have the assistance of a chancellor in enforcing a written contract with a parol variation. This was laid down by Chancellor Kent, in the case of Gillespie *v.* Moon,[4] and has been recognised in several States.[5] In others the case has not been followed and the English rule is adhered to.[6]

[1] This distinction is independent of the Statute of Frauds.

[2] 6 Vesey, 328. See, also, Woolam *v.* Hearn, 2 Lead. Cas. Eq. 484, and notes.

[3] Darnley *v.* Lond. Chat. & Dov. Rd. Co., L. R., 2 H. L. Cas. 43; Fry on Spec. Perf., § 515 *et seq.*

[4] 2 Johns. Ch. 585.

[5] See Kiesselbrack *v.* Livingston, 4 Johns. Ch. 144; Wall *v.* Arrington, 13 Geo. 88; Mosby *v.* Wall, 23 Miss. 81; Philpott . Elliott, 4 Maryl. Ch. 273, Creigh *v.* Boggs, 19 W. Va. 240; Moale *v.* Buchanan, 11 Gill & J. 314; Tilton *v.* Tilton, 9 N. Hamp. 385; Bellows *v.* Stone, 14 Id. 175; Bradford *v.* Union Bank, 13 How. 57.

[6] Elder *v.* Elder, 1 Fairfield, 80; Os-

It must next be noticed that an important point which is often to be taken into consideration, in determining whether a contract shall or shall not be enforced, is the effect of the statute of frauds. In cases which fall within that statute, it is obvious that to carry the rule in Gillespie *v.* Moon to the extent of holding that an agreement (for example), to convey fifty acres may, for the sake of justice and equity, be construed to mean a contract to convey one hundred, would be to repeal the statute of frauds, and to give effect to a simple verbal agreement to sell land. Where, however, the contention of the complainant is that something which is actually embraced in the writing was not intended to be included therein, to suffer him to show this is not to enforce a parol contract in relation to land, it is simply to prove that a written contract did not embrace all that on its face appeared to include.[1] Such was the actual state of the case in Gillespie *v.* Moon.[2]

383. It is well known that by the statute of frauds (the provisions of which have been adopted by legislative enactments in most of the United States), all uncertain interests in land created by parol merely had the force and effect, both at law and in equity, of estates at will only, saving always leases not exceeding three years from the making thereof. While, however, the provisions of this statute were rigorously enforced at law, it was considered in equity that a case might be taken out of the statute by peculiar circumstances which might render its application inequitable and unjust. The statute being designed to prevent frauds, equity would not allow it to be used or set up for the purpose of effecting a fraud.[3] Hence there arose certain well-established exceptions to the statute, in which equity would lend its aid to protect a party in the enjoyment of real estate, or

born *v.* Phelps, 19 Conn. 63; Westbrook *v.* Harbeson, 2 McCord Ch. 112; Brooks *v.* Wheelock, 11 Pick. 439; Miller *v.* Chetwood, 1 Green Ch. 199; Dennis *v.* Dennis, 4 Rich. Eq. 307; Best *v.* Stow, 2 Sandf. Ch. 298; Climer *v.* Hovey, 15 Mich. 18; and see American note to Woollam *v.* Hearn, 2 Lead. Cas. Eq. 484, 485 (4th Am. ed.); 1 Sug. V. and P. 243 (8th Am. ed.), and notes.

[1] See American notes to Woollam *v.* Hearn, *ut sup.*

[2] See Glass *v.* Hulbert, 102 Mass. 24, where the authorities are examined and the case of Gillespie *v.* Moon explained. See also article in 24 Am. Law Reg. 81.

[3] See this phrase explained in Britain *v.* Rossiter, 11 Q. B. Div. 130, and Maddison *v.* Alderson, 8 App. Cas. 474.

actively to assert his rights thereto under a parol contract.[1] These cases may be reduced to three classes: first, where there has been a part performance of the contract; secondly, where the reduction of the contract to writing has been prevented by fraud; and thirdly, where the contract is admitted by the defendant's answer, and the statute is not set up as a defence.[2]

384. The doctrine of part performance is based upon the principle that where a contract is so far performed that the parties could not be restored to their original position if the contract was rescinded, it would be highly unjust to allow any technical objection to the fulfilment of the contract to be interposed. Hence, if a verbal contract is made for the sale of real estate, and is acted upon to the extent above indicated, neither party can then refuse to perform it on the ground that the provisions of the statute of frauds have not been complied with. If, for example, upon the faith of a parol agreement, the purchaser has gone into possession, has paid the purchase-money and has made valuable improvements, the vendor will not be suffered to set up the statute of frauds as a ground for refusing to execute a conveyance. The case, as it is said, is taken out of the statute.[3]

385. The general doctrine of part performance is well established; and if recognised in most of the States of the Union.[4]

[1] As to the evidence required in such cases, see Lord's Appeal, 105 Pa. St. 451; Moyer's Appeal, Id. 432.

[2] See Smith's Manual of Equity, 252.

[3] Adams's Eq. 86. See Maddison *v.* Alderson, L. R., 8 App. Cas. 474, where the doctrine is carefully explained by Lord Selborne. Also, Britain *v.* Rossiter, 11 Q. B. Div. 130.

[4] In Wright *v.* Pucket, 22 Grat. 374, it is said that from the numerous decisions upon the subject the following principles may be extracted:—

1st. The parol agreement relied on must be certain and definite, and definite in its terms:

2d. The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved: and

3d. The agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation.

These propositions seem to be fairly deducible from the authorities. See, upon this subject, Purcell *v.* Miner, 4 Wall. 513; Newton *v.* Swazey, 8 N. H. 9; Annan *v.* Merritt, 13 Conn. 478; Parkhurst *v.* Van Cortland, 14 Johns. 15; Miller *v.* Ball, 64 N. Y. 286; Dougan *v.* Blocher, 12 Harris, (Pa.) 28; McCue *v.* Johnston, 1 Casey, 306; McGibbeny *v.* Burmasster, 3 P. F. Sm. 332; Pleasanton *v.* Raughley, 3 Del. Ch. 124; Cannon *v.* Collins, Id. 132; Campbell *v.* Freeman, 20 W. Va. 398; Gough *v.* Crane, 3 Md. Ch. 119; Har-

The difficulty in most cases has been to say what will take a case out of the statute; in other words, what must be the predicament of the parties which would justify a court in saying that it would be inequitable to suffer the bar of the statute to be set up.[1]

It is settled that going into possession under the contract, and making improvements will be sufficient.[2] And in some cases entry into possession alone has been held to be enough.[3] But possession must be taken under and by virtue of the contract, otherwise it cannot avail, and, indeed, as a general rule anything that is relied upon to take the case out of the statute must be done in pursuance of the contract, and must not be referrible to another title.[4] If the vendee is already in possession of the property, the continuance of this possession will not be considered a part performance to take the case out of the statute.[5]

desty *v.* Richardson, 44 Md. 617; Wilde *v.* Fox, 1 Rand, 165; Printup *v.* Mitchell, 17 Ga. 558; Parke *v.* Leewright, 20 Mo. 35; Sweeny *v.* O'Hara, 43 Ia. 36; Ottenhouse *v.* Burleson, 11 Tex. 87; Arguello *v.* Edinger, 10 Cal. 150; Galbraith *v.* Galbraith, 5 Kans. 402. In other States, however, the rule is different; see Stearns *v.* Hubbard, 8 Greenl. 320; Patterson *v.* Yeaton, 47 Me. 308; Parker *v.* Parker, 1 Gray, 409; Patton *v.* M'Clure, 1 Mart. & Yerg. 333; Ridley *v.* McNairy, 2 Humph. 174; Robeson *v.* Hornbaker, 2 Green Ch. 60; Wingate *v.* Dail, 2 Har. & J. 76; Ellis *v.* Ellis, 1 Dev. Eq. 341; Albea *v.* Griffin, 2 Dev. & Bat. Eq. 9; Allen *v.* Chambers, 4 Ired. Eq. 125; 1 Sug. V. and P. 225, note (8th Am. ed.).

[1] See Milliken *v.* Dravo, 17 P. F. Sm. 230.

[2] Freeman *v.* Freeman, 43 N. Y. 34; Casler *v.* Thompson, 3 Green Ch. 59; Smith *v.* Smith, 1 Rich. Eq. 130; Deniston *v.* Hoagland, 67 Ill. 265; West *v.* Bundy, 78 Mo. 407; Dunn *v.* Stevens, 94 Ind. 181; Nunn *v.* Fabian, L. R., 1 Ch. 35; Williams *v.* Evans, Id. 19 Eq. 557. The improvements must be of a permanent character; Peckham *v.* Barker, 8 R. I. 17; Wack *v.* Sorber, 2 Whart. 387.

[3] Green *v.* Richards, 8 C. E. Green, 32; s. c. on appeal, Id. 539; Smith *v.* Underdunck, 1 Sandf. Ch. 579; Pugh *v.* Good, 3 Watts & Serg. 56; Moale *v.* Buchanan, 11 Gill & J. 314; Hart *v.* Hart, 3 Dess. 592; Anderson *v.* Chick, 1 Bailey, Ch. 118; Brock *v.* Cook, 3 Porter, 464; Waggoner *v.* Speck, 3 Ham. 292; Palmer *v.* Richardson, 3 Strobh. Eq. 16. But see Moore *v.* Small, 7 Harris, (Pa.) 461.

[4] Mills *v.* Haywood, L. R., 6 Ch. D. 196; Wright *v.* Pucket, 22 Grat. 374; Robertson *v.* Robertson, 9 Watts, 32, 42; Phillips *v.* Thompson, 1 Johns. Ch. 131, 149; Smith *v.* Smith, 1 Rich. Eq. 130; Sanborn *v.* Sanborn, 7 Gray, 142, 146; Ham *v.* Goodrich, 33 N. Hamp. 38; Halsten *v.* Savannah, etc., R. R., 51 Ga. 199; Lester *v.* Kinne, 37 Conn. 9, 14; 1 Sug. V. and P. 226, note (8th Am. ed.).

[5] Hatcher *v.* Hatcher, 1 McMullan, Ch. 311; Johnston *v.* Glancy, 4 Black.

But mere payment of the purchase-money is not enough, unless, indeed, owing to peculiar circumstances the purchaser cannot be restored to his original position by repayment.[2]

When a parol contract is entered into in consideration of marriage, the solemnization of the marriage is not such a part performance as will take the case out of the statute.[3]

A party seeking specific performance cannot rely upon a part performance by the defendant to take the case out of the statute.[4]

The doctrine of part performance will operate to prevent a vendee who has gone into possession from insisting upon objections to the vendor's title. A waiver of objections may thus be presumed from conduct.[5] The relief, however, if obtained at all, must be sought for in equity. It will not be given in a court of law.[6] In some of the States, however, there are decisions tending to show that there may be a parol waiver of one

94; Christy *v.* Barnhart, 2 Harris, (Pa.) 260; Mahana *v.* Blunt, 20 Iowa 142; Wilmer *v.* Farris, 40 Id. 310. See, however, Blanchard *v.* McDougal, 6 Wis. 167; Spalding *v.* Conzelman, 30 Missouri, 177. Where specific performance cannot be decreed the bill may be retained for the purpose of affording the intended purchaser compensation for improvements. Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 273; Phillips *v.* Thompson, Id. 131.

[1] Clinan *v.* Cooke, 1 Sch. & L. 40; Hughes *v.* Morris, 2 De G., M. & G. 356; Purcell *v.* Miner, 4 Wall. 513; Kidder *v.* Barr, 35 N. Hamp. 235; Glass *v.* Hulbert, 102 Mass. 21; Jones *v.* Newhall, 115 Id. 244; Eaton *v.* Whitaker, 18 Conn. 222; McKee *v.* Phillips, 9 Watts, 85; Parker *v.* Wells, 6 Whart. 153; Allen's Est., 1 Watts & Serg. 383; Weise's Appeal, 22 P. F. Sm. 351–355; Forrester *v.* Flores, 64 Cal. 24; Cole *v.* Potts, 2 Stockt. 67; Underhill *v.* Allen, 18 Ark. 466; Lefferson *v.* Dallas, 20 Ohio St. 74; Mather *v.* Scoles, 35 Ind. 5; Neal *v.* Gregory, 19 Fla. 356; Peckham *v.* Balch, 49 Mich. 179; Townsend *v.* Fenton, 30 Minn. 528; 1 Sug. V. and P. 229 (8th Am. ed.). But in Iowa, payment of the purchase-money is sufficient to take the case out of the statute. Fairbrother *v.* Shaw, 4 Iowa, 570; Olive *v.* Dougherty, 3 G. Greene, (Iowa) 371; Johnston *v.* Glancy, 4 Blackf. 94; and in Delaware the rule is the same; Houston *v.* Townsend, 1 Del. Ch. R. 416; Townsend *v.* Houston, 1 Harr. 532.

[2] Malins *v.* Brown, 4 Comst. 403; Everts *v.* Agnes, 4 Wis. 343; Johnson *v.* Hubbell, 2 Stockt. 332.

[3] Caton *v.* Caton, L. R., 1 Ch. 137; L. R., 2 H. La. 127. See Ungley *v.* Ungley, L. R., 4 Ch. D. 73, affirmed in 5 Id. 887, where there was also a transfer of possession and specific performance was decreed.

[4] Caton *v.* Caton, *supra*. See, also, Luckett *v.* Williamson, 37 Mo. 388.

[5] Palmer *v.* Richardson, 3 Strobh Ex. 16.

[6] Goss *v.* Ld. Nugent, 5 B. & Ad. 58.

or more of the terms of a contract which the statute requires to be in writing.[1]

386. The second class of cases in which the statute of frauds cannot be insisted upon for the purpose of defeating a parol contract as to realty, embraces those in which the reduction of the contract to writing has been prevented by fraud.

Thus, if an intended husband, having promised to reduce a marriage settlement to writing, fraudulently prevents it from being done, and the marriage takes place in consequence of false assurances and contrivances, the circumstance that the agreement rests in parol cannot be taken advantage of in resisting an application for specific performance.[2]

This class of cases, however, falls under the head of actual fraud, and is governed by the rules which apply to that branch of equitable jurisdiction. They are noticed in this connection simply in order to illustrate the rule in equity which forbids the statute of frauds to be used as an instrument to defeat the right to specific performance.

387. In the third place, a case will be taken out of the statute when the parol contract is admitted by the defendant in his answer, and the statute is not therein insisted upon as a defence. In such a case there can be no possibility of fraud or mistake; because nothing could be stronger evidence of the truth and accuracy of the plaintiff's version of the agreement, than the written admission by the defendant under oath. And the statute having been made for the protection of the defendant, it is perfectly competent for him to waive its benefit.[3]

If, however, the defendant insists upon the statute as a bar, the written admission in his answer will not avail to take the case out of the statute.[4]

[1] Stearns *v.* Hall, 9 Cush. 31; Cummings *v.* Arnold, 3 Met. 486; Buel *v.* Miller, 4 N. Hamp. 196; 1 Sug. V and P. 252 (8th Am. ed.).

[2] See Montacute *v.* Maxwell, 1 P. Wms. 618; Story's Eq. Jurisp., § 758; Wharton's Evidence, § 911.

[3] See Gunter *v.* Halsey, Amb. 586; Harris *v.* Knickerbacker, 5 Wend. 638; McGowen *v.* West, 7 Mo. 569; Smith's Manuel of Equity, 252; Browne on Stat. of Frauds, § 476; Wharton's Evidence, § 912.

[4] Walters *v.* Morgan, 2 Cox Ch. 369; Whitbread *v.* Brockhurst, 1 Bro. Ch. 416; Cooth *v.* Jackson, 6 Ves. 37; Thompson *v.* Tob, 1 Pet. C. C. 385; Thompson *v.* Jameson, 1 Cranch C. C. 295; Brooks *v.* Wheelock, 11 Pick. 439; Robeson *v.* Hornbaker, 3 N. J. Eq. 60; Story's Eq. Jurisp., § 757,

388. It has been stated above that one of the reasons why the remedy of specific performance was introduced in equity, was because at law the plaintiff is obliged to show on his part precise compliance with all the terms of the agreement, whereas chancery would sometimes afford him relief although he was unable to prove this exact fulfilment. It will be proper now to consider the two methods in which courts of equity grant this indulgence—viz., decreeing performance with compensation for defects, and giving time to make a title beyond the stipulated day.

389. And first as to performance with compensation for defects. It is settled that immaterial deficiencies will not deprive the vendor of his right to have the contract performed as against the vendee—provided that the deficiencies are such as may be compensated in money. Under such circumstances the vendee may be compelled to take the property, and a suitable deduction will be made in the price.[1]

But if the deficiencies are material and important, the vendee will not be compelled to take the property.[2] He is entitled to have what he bargained for; and it would, obviously, be extremely unjust to force anything upon him which he had not designed or contracted to buy. If there is a failure in that which is an inducement to the purchase, he will not be compelled to take.[3]

390. It may sometimes happen that defects exist which render the property less valuable than the contract-price; but which, nevertheless, may not be of so vital a character as to induce the purchaser entirely to throw up his bargain. In such a case the equity of specific performance with compensation

[1] Hepburn *v.* Auld, 5 Cranch, 262; King *v.* Bardeau, 6 Johns. Ch. 38; Harbers *v.* Gadsden, 6 Rich. Eq. 284; D'Wolf *v.* Pratt, 42 Ill. 198; Seton *v.* Slade, 2 Lead. Cas. Eq., pp. 11, 33. The compensation may take another shape than a sum of money. Thus, in decreeing the specific performance of agreements for the partition of coal mines, an allowance of so much coal may be made; Young *v.* Frost, 1 Maryl. 377; King *v.* Ruckman, 5 C. E. Green, 316; Coleman's Appeal, 12 P. F. Sm. 252.

[2] Whittemore *v.* Whittemore, L. R., 8 Eq. 603.

[3] Peers *v.* Lambert, 7 Beav. 546; Rugge *v.* Ellis, 1 Dessaus. 160; Wainwright *v.* Read, Id. 573; Cordingley *v.* Cheesebrough, 3 Giff. 496; Stoddart *v.* Smith, 5 Binney, 355; Marvin *v.* Bennett, 8 Paige. 312; 1 Sug. V. and P. 479 (8th Am. ed.)

comes into play for the benefit of the vendee. He is entitled to have the agreement carried out, and yet at the same time to have an abatement or allowance made by reason of the defects.[1] Such a relief cannot, it is manifest, be obtained at law; and, therefore, is an additional illustration of the advantages of this kind of equitable remedy.[2]

There must, however, be some limits to this right of the vendee to elect to have the contract performed with compensation for defects; because in some instances its exercise would work great injustice to the vendor. Thus a seller could not, for example, at the election of the purchaser, be deprived of his mansion house and park to which he could make a good title, while a large adjoining estate, held and sold with it, would be left on his hands with a proclaimed bad title.[3]

Nor can a vendor be required to convey a different parcel of land from that agreed to be conveyed.[4]

The right both of the vendor and vendee cannot be exercised unless the defect is one which is capable of being measured by a pecuniary standard; in other words, capable of compensation. The compensation must not be a mere matter of arbitrary damages, or of indemnity for future risk.[5]

391. The second of the methods in which a court of equity grants indulgence to a party who has been unable to fulfil exactly his part of an agreement, and yet seeks the aid of the court to have it specifically enforced, is by giving time to make out a title beyond the day which the contract specifies. This is

[1] Thomas *v.* Dering, 1 Keen, 729; Powell *v.* Elliot, L. R., 10 Ch. 424 (where a bill for specific performance was filed by the vendor, and a cross bill for rescission by the vendee, and the decree was for specific performance with an allowance for misrepresentations as to value); Wheatley *v.* Slade, 4 Sim. 126; Graham *v.* Oliver, 3 Beav. 124; Nelthorpe *v.* Holgate, 1 Coll. 203; Barker *v.* Cox, L. R., 4 Ch. D. 464; Stockton *v.* Union Oil Co., 4 West Va. 273.

[2] See Johnson *v.* Johnson, 3 Bos. & Pul. 162. See, also, Denton *v.* Stewart, 1 Cox, Ch. 258; Andrews *v.* Brown, 3 Cush. 130; Harrison *v.* Deramus, 33 Alab. 463; Bell *v.* Thompson, 34 Id. 633; Lee *v.* Howe, 27 Missouri, 521; Smith *v.* Fly, 24 Tex. 345; Phillips *v.* Thompson, 1 Johns. Ch. 149; Parkhurst *v.* Van Cortlandt, Id. 273; Scott *v.* Billgerry, 40 Miss. 119; Morss *v.* Elmendorf, 11 Paige, 277.

[3] Sug. V. and P. 316 (vol. i. 480, 8th Am. ed.).

[4] Id. See Castle *v.* Wilkinson, L. R., 5 Ch. 534.

[5] Adams's Eq. 91.

done in pursuance of the maxim that time is not ordinarily of the essence of the contract in equity,[1] although it may sometimes become so. What is meant by this maxim and by its qualification, is this: A court of equity will relieve against and enforce specific performance notwithstanding a failure to keep the dates assigned by the contract, either for the completion, or for the steps towards completion, if it can do justice between the parties, and if there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant when it is said that in equity time is not of the essence of the contract.[2]

392. An example of the rule now under consideration is where a vendor has undertaken to make a title on a certain day, and has failed to do so by reason of some defect in the title, which defect, however, is susceptible of being cured. It will be observed that the rule, as thus stated, does not apply to those cases in which the delay on the part of the vendor is due, not to any defects in his title which he desires time to remedy, but to his own carelessness and *laches*. Due diligence is required on both sides.[3] A vendor cannot have specific performance if he has been urged by the purchaser to take steps, but has not done so.[4] But where the delay is not due to the *laches* of the seller,

[1] Time is, in general, of the essence of the contract at law. Wilde *v.* Fort, 4 Taun. 334; Steer *v.* Crowley, 14 C. B. N. S. 337.

[2] Tilley *v.* Thomas, L. R., 3 Ch. 67. In Hepburn *v.* Auld, 5 Cranch, 262, Brashier *v* Gratz, 6 Wheat. 528, and Bank of Columbia *v.* Hagner, 1 Pet. 455, it was held that, in equity, time was not of the essence of a contract. See, also, Remington *v.* Irwin, 2 Harris, (Pa.) 143; Tiernan *v.* Roland, 3 Id. 429; Bryson *v.* Peak, 8 Ired. Eq, 310; and Glover *v.* Fisher, 11 Ill. 666. But in Goldsmith *v.* Guild, 10 Allen, 239, the court did not approve of the doctrine. See 1 Sug. V. and P. 411 (8th Am. ed.).

[3] Merritt *v.* Brown, 6 C. E. Green, 401; Johns *v.* Norris, 7 Id. 102; Taylor *v.* Longworth, 14 Peters, 172; Dubois *v.* Baum, 10 Wright, (Pa.) 537; Cureton *v.* Gilmore, 3 S. Carolina, (N. S.) 46; Eastman *v.* Plumer, 46 N. Hamp. 464, 479; Rogers *v.* Saunders, 16 Maine, 92; Wilkins *v.* Evans, 1 Del. Ch. R. 156 (a case in which delay on the part of the purchaser was excused); Benedict *v.* Lynch, 1 Johns. Ch. 375; Leaird *v.* Smith, 44 N. Y. 618; 1 Sug. V. and P. 261.

[4] It is not necessary that a demand for a deed should precede a bill for the specific performance of a contract to convey. This results from the distinction between a suit in equity for

but to defects in the title which may be cured, a bill for specific performance may be maintained, for it is sufficient if a party entering into articles to sell has a good title at the time of the decree.[1] The court rectifies the incidental delay by giving the intermediate rents to the purchaser, and interest on the purchase-money to the vendor.

Such, then, is the general rule. It is subject to the qualification that time may be made the essence of a contract by express stipulation of the parties, or by presumption growing out of the nature of the property, or by surrounding circumstances.

393. As to "express stipulations" nothing need be said. It is perfectly clear that parties may stipulate that time shall be essential, and that when such a stipulation exists, it ought to be enforced.[2]

It is also clear that the nature of the subject-matter of the sale may render time of the essence of the contract. The case usually put is that of the sale of a reversion. Trades or manufactories furnish another illustration. The case of mines is still another example; for the whole purpose of the purchase may be the chance of an early development of the mine, and a speedy introduction of its product into the market.[3]

394. As to the "surrounding circumstances" which may render time of the essence of the contract they must, of course, depend upon the facts of each particular case; such as whether the value of the property has greatly diminished, whether the vendee has bought to sell again, and so forth.[4] Indeed, in this

specific performance, and an action at law for non-performance, namely, that in the latter the right of action grows out of a breach of the contract, and a breach must exist before the commencement of the action, while in the former the contract itself, and not the breach of it, gives the action, Bruce *v.* Tilson, 25 N. Y. 194; Welland *v.* Huber, 8 Nevada, 207.

[1] See Dresel *v.* Jordan, 104 Mass. 415; Barnard *v.* Lee, 97 Id. 92.

[2] See Barnard *v.* Lee, 97 Mass. 94; Patchin *v.* Lamborn, 7 Casey, 314; Ives *v.* Armstrong, 5 R. Island, 567 Stow *v.* Russell, 36 Ill. 18; Heckard *v.* Sayre, 34 Id. 142; King *v.* Ruckman, 5 C. E. Green, 316; 6 Id. 599; Webb *v.* Hughes, L. R., 10 Eq. 281.

[3] Macbryde *v.* Weekes, 22 Beav. 533; Parker *v.* Frith, 1 Sim. & Stu. 199; n.; Day *v.* Luhke, L. R., 5 Eq. 336; Claydon *v.* Green, L. R., 3 C. P 511; Cowles *v.* Gale, L. R., 7 Ch. 12; Newman *v.* Rogers, 4 Bro. C. C. 391; Adams's Equity, 88; 1 Sugden V. and P. 403 (8th Am. ed.).

[4] McKay *v.* Carrington, 1 McLean, 50.

country, the fact that land bears a much more commercial character than it does in England, is subject to more fluctuations, and has more of a speculative value, has led to not a few expressions of judicial opinion that time ought, as a general rule, to be considered as of the essence of a contract.[1] But, perhaps, the safest statement of the law is to say that the general rule is the same in the United States as in England, but that exceptions growing out of the circumstances of the individual transaction are more numerous, and are looked upon with more favor.

395. It was stated above that the efficiency of the English courts of equity in granting specific relief, has been increased by the power conferred upon them of giving damages. This is done by virtue of the statute 21 & 22 Vic., c. 27, commonly known as Sir Hugh Cairns's Act, which provides that the courts may, either in addition to, or in substitution for the relief which is prayed, grant that relief which would otherwise be proper to be granted by another court, *i. e.*, award damages.

Before this act the law had been the other way. If a purchaser had recourse to equity, and it appeared that the vendor had since the filing of the bill sold the estate to another person, the court could not give the complainant damages. But if pending a suit for specific performance the seller had disposed of part of the property—*e. g.*, stone in a quarry—the court would take care that the purchaser had full compensation in damages.[2] The general rule in the United States is the same, but courts have, in some instances, inclined to favor the right to give damages, and to retain the bill to that end.[3] But in England, by the act just cited, damages may be given, and the amount thereof assessed by a jury.[4] Damages, however, will not be given in a case in

[1] See dissenting opinion of Mr. Justice Livingston in Hepburn *v.* Auld, 5 Cranch, 279. See, also, Richmond *v.* Gray, 3 Allen, 30, 31; Goldsmith *v.* Guild, 10 Id. 239; 1 Sug. V. and P. 411 (8th Am. ed.). note.

[2] 1 Sug. V. and P. 350 (8th Am. ed.).

[3] See Phillips *v.* Thompson, 1 Johns. Ch. 131; Hatch *v.* Cobb, 4 Id. 559; Kempshall *v.* Stone, 5 Id. 193; Jervis *v.* Smith, 1 Hoff. Ch. 470; Woodman *v.* Freeman, 25 Maine, 531; Nelson *v.* Hagerstown Bank, 27 Maryl. 76; Nagle *v.* Newton, 22 Grattan, 814; May *v.* LeClaire, 11 Wal. 236; Masson's Appeal, 20 P. F. Sm. 26; Peabody *v.* Tardell, 2 Cush. 226; Andrews *v.* Brown, 3 Id. 131; Cathcart *v.* Robinson, 5 Peters, 278; Holland *v.* Anderson, 38 Missouri, 55; Fry on Spec. Perf. 449 (2d Am. ed.); 1 Story's Eq, §§ 780, 788; *post*, Chap. III.

[4] Or, now, by the Court, Jaques *v.* Millar, L. R., 6 Ch. D. 153.

which a bill for specific performance would not be entertained; for to do so would be simply to turn the equitable remedy into a common-law action.[1]

396. In some of the United States, either in obedience to statutory enactments, or by virtue of a common law peculiar to the State, the remedy of specific performance may be enforced through the medium of a common-law action.[2] This is especially the case in Pennsylvania, where the action of ejectment has been, and still is, a favorite method of compelling either a vendor or a vendee to fulfil his agreement. In the former case, the purchaser recovers a verdict conditioned upon the payment of the purchase-money by the plaintiff; in the latter, the seller has a verdict, which is to be released upon the payment of the price by the buyer. Certain rules have been thrown around this species of action, growing out of the fact that it is one originally of common-law origin; and, therefore, amenable to strict common-law rules—*e. g.*, tender of a deed before bringing an action—which (it must be remembered) do not apply when relief is sought by a bill for specific performance.[3]

397. Before leaving the subject of specific performance, it may be well to notice the fact that persons may, in some cases, be compelled to specifically perform promises or make good representations, upon the faith of which others have acted. This subject, however, has been already noticed under the head of Fraud.

398. It may, also, be observed that while a court of equity will not ordinarily attempt to enforce covenants, which cannot be carried out by the machinery of a court, *e. g.*, a covenant by a singer to sing, or an actor to perform, it may, nevertheless, practically attain the same end by enjoining the party from a breach of his negative covenant, viz., by preventing him from performing elsewhere. This exercise of the power of a chancellor, however, falls more properly under the head of Injunctions, where it will, therefore, be considered.

[1] See Welsh *v.* Bayaud, 6 C. E. Green, 186; 1 Sug. V. and P. 353 (8th Am. ed.).

[2] See Weber *v.* Marshall, 19 Cal. 452; Fisher *v.* Moolick, 13 Wis. 321.

[3] See *ante*, p. 452, note 4.

CHAPTER II.

INJUNCTIONS.

SECTION I.

GENERAL NATURE OF INJUNCTIONS; INJUNCTIONS TO RESTRAIN INFRINGEMENT OF EQUITABLE RIGHTS; AND HEREIN OF INJUNCTIONS TO RESTRAIN PROCEEDINGS AT LAW; OF BILLS OF PEACE; AND OF BILLS OF INTERPLEADER.

399. Definition of an injunction.
400. Injunctions either mandatory or prohibitory; mandatory injunctions.
401. Prohibitory injunctions.
402. Character of the equitable remedy by injunction.
403. Classification of injunctions; interlocutory and perpetual.
404. Ex parte, or at the hearing.
405. Common, or special.
406. General division of the subject of injunctions.
407. Injunctions to restain proceedings at law; *Earl of Oxford's Case.*
408. Not in the nature of Writs of Prohibition.
409. General nature of this jurisdiction.
410. General extent of this jurisdiction; equitable titles protected.
411. Equitable rights protected.
412. Equitable remedies assisted.
413. Injunctions to prevent vexatious litigation; election between remedies.
414. Injunctions after the court has assumed jurisdiction of a cause.
415. Bills of Peace, two classes; assertion of a common right.
416. *Sheffield Water Works* v. *Yeomans.*
417. General rules as to Bills of Peace of the first class; *Phillips* v. *Hudson.*
418. Bills of Peace of the second class.
419. Bills of Interpleader.
420. Bills must show title in two claimants.
421. Complainants must claim no interest.
422. Debt or duty must be the same.
423. Injunctions in aid of proceedings in Bankruptcy.
424. In what courts proceedings will be restrained.
425. Injunctions in cases of trusts and mortgages.
426. Injunctions between partners.
427. Restraint of disclosure of confidential communications.

399. An injunction in its ordinary sense is a command, and this command may be either to do or to refrain from doing some particular thing.

An injunction in its legal sense is a writ remedial, issuing by

order of a court of equity,[1] and commanding a defendant to perform some act, or restraining a defendant from the commission or continuance of some act.[2]

400. An injunction may, therefore, be said to be either mandatory or prohibitory. A mandatory injunction is one that compels the defendant to restore things to their former condition, and virtually directs him to perform an act.[3] The jurisdiction of the court to issue such a writ has been questioned;[4] but it is now established beyond doubt.[5]

"This court," said Lord Justice Cotton, in Loog *v.* Bean,[6] "when it sees that a wrong is committed, has a right *at once to put an end to it*, and has no hesitation in doing so by a mandatory injunction, if it is necessary for the purpose."

The form of the order, however, was not, under the old practice, *direct* in its terms; but the end was reached by a writ apparently prohibitory. Thus an injunction that a defendant should deliver up books and papers in his possession has been issued in the following words: "Let an injunction be awarded to restrain the defendant H. from detaining and keeping possession of the books, deeds, documents and papers removed, as mentioned in the plaintiff's affidavit, by the said defendant, or by his order, from the chambers occupied by the plaintiff, for retaining which no written authority has been produced by the defendant; and from permitting the same, or any, or either of them to remain away from the office of the plaintiff, or from parting with the same to any person or persons, other than the plaintiff."[7] This order, it will be observed, is in terms a restraining order; but in effect it is a command to the defendant to

[1] And in some cases by courts of common law in the exercise of equitable jurisdiction.

[2] Joyce on Injunctions, 1; Hilliard on Injunctions, Ch. I., § 1.

[3] Joyce on Injunctions, 1309, 1310. As to the right of a court of equity to compel the restoration of property to its original condition, see note to Henry *v.* Koch, 22 Am. Law Reg. 394-403.

[4] Blakemore *v.* Glamorganshire Canal Navigation, 1 Mylne & Keene 184.

[5] Robinson *v.* Lord Byron, 1 Bro. C. C. 588; Great North of England Railway Co. *v.* Clarence Railway Co., 1 Coll. 507; Hervey *v.* Smith, 1 K. & J. 392; Att. Gen. *v.* Borough of Birmingham, 4 K. & J. 547; Kerr on Injunctions, 230.

[6] 26 Ch. Div. 314.

[7] Joyce on Injunctions, 1310. See Wellington *v.* Railroad Co., 107 Mass. 582; and Manhattan Manuf. Co. *v.* New Jersey Stock Yard Co., 8 C. E. Green, 166.

deliver up the books and papers. But under the modern practice the better form, perhaps, is that the decree should be not only in effect, but in terms, mandatory. Thus, in a recent Pennsylvania case the language of the decree was as follows: "It is further ordered that the defendants (naming them) do forthwith proceed to erect a good and substantial iron fence along the western boundary of the Kennett Square Preparative Meeting of Friends, in Kennett Square, Chester county, and to extend the fences, already erected along the northern and southern lines of the said grounds respectively."[1] There seems to be no good reason why this direct form of decree should not be used.

Many occasions may arise which render a mandatory injunction necessary. Thus a party who has diverted water from its proper channel may be compelled by mandatory injunction to restore it.[2] So a mandatory injunction issues to remove a nuisance;[3] to prevent the continuance of trespasses for which there is no adequate legal remedy;[4] and to compel the defendant to deliver up the possession of real estate which had been adjudged to belong to the plaintiff by decree.[5] In this last case the injunction is in the nature of a writ of execution. A mandatory injunction is granted only with great caution;[6]—especially upon an interlocutory application, and before final decree;[7] and the inclination of the American courts was, at one time, very much against granting such an interlocutory injunction.[8]

[1] Hall's Appeal, 110 Pa. St. 55.

[2] Corning *v.* Troy Iron Co., 40 N. Y. 191; Lane *v.* Newdigate, 10 Ves. 192; Storer *v.* Great Western Railway Co., 2 Y. & C. Ch. 48; Cooke *v.* Chilcott, L. R., 3 Ch. D. 694; Goodson *v.* Richardson, L. R., 9 Ch. 221; McCollom *v.* Morrison, 14 Florida, 414; Green *v.* Canny, 137 Mass. 64.

[3] Gale *v.* Abbott, 8 Jur. N. S. 987; Hervey *v.* Smith, 1 K. & J. 392; Van Bergen *v.* Van Bergen, 2 Johns. C. 272; State of Penna. *v.* Wheeling Bridge Co., 13 How. 518.

[4] Manchester Railway Co. *v.* Worksop Board of Health, 23 Beav. 198; Eachus *v.* Moss, 14 Week. Rep. 327; Martyr *v.* Lawrence, 2 De G., J. & S. 261; Att. Gen. *v.* Mid. Kent Railway Co., L. R., 3 Ch. 100; High on Injunctions, § 478.

[5] See Garretson *v.* Cole, 1 Har. & Johns. 370; High on Injunctions, § 260.

[6] See Mayer's Appeal, 23 P. F. Sm. 164; Durell *v.* Pritchard, L. R., 1 Ch. 250. See, also, Powell Duffryn Steam Coal Co. *v.* Taff Vale Railway Co., L. R., 9 Ch. 331.

[7] Turner *v.* Spooner, 1 Dr. & Sm. 467.

[8] Audenried *v.* Philadelphia & Reading Rd., 18 P. F. Sm. 370; Washington University *v.* Green, 1 Maryl. Ch. 97; Rogers *v.* Erie, 20 N. J. Eq. 379;

The tendency, however, is now towards greater liberality in granting such applications.[1] And in England the better opinion is, that a mandatory injunction *may* be had upon interlocutory application.[2]

Indeed, there would seem to be no good reason why, in a proper case, a mandatory injunction should not issue upon preliminary hearing. Gross violations of rights may occur in the shortest possible time; and a few hours wrong-doing may result in the creation of an intolerable nuisance or in the production of an injury which, if prolonged, might soon become irreparable. In such cases the interposition of the strong arm of the chancellor ought to be most swift; and if the immediate relief afforded could not, in a proper case, be restorative, as well as prohibitory, no adequate redress would, in many instances, be given.[3]

401. A prohibitory injunction, as its name imports, is one which is granted for the purpose of restraining the defendant from the continuance or commission of some act which is injurious to the plaintiff. This is by far the more frequent form which the injunction assumes; and it is met with in the every-day exercise of equitable powers. The occasions which call it forth will be explained further on.

402. The relief afforded by the writ of injunction is probably the most effective, the most characteristic and the most extensive of equitable remedies. It is most frequently employed (as has been already stated) in its prohibitory form, and it is used

Camblos *v.* Philadelphia & Reading Rd., 30 Leg. Int. 149 (U. S. Circ. Court, East. Dist. Penna.). See, also, The Farmers' Railroad Co. *v.* The Reno Oil Creek & Pit Hole Railway Co., 3 P. F. Sm. 224.

[1] See Carlisle *v.* Stevenson, 3 Maryl. Ch. 499; Longwood Valley Rd. *v.* Baker, 27 N. J. Eq. 166. Also, Pettibone *v.* Hamilton, 40 Wis. 402; Cole Silver Mining Co. *v.* Virginia Co., 1 Sawyer, 685; Hanover Fire Ins. Co. *v.* Germania Fire Ins. Co., 33 Hun, 539; Norfolk Trust Co. *v.* Marye, 25 Fed. Rep. 664; Earl Mexborough *v.* Bower, 7 Beav. 127; Smith *v.* Smith, L. R., 20 Eq. 500.

[2] Lane *v.* Newdigate, 10 Ves. 192; Robinson *v.* Lord Byron, 1 Bro. C. C. 588; Rankin *v.* Huskisson, 4 Sim. 13; Hervey *v.* Smith, 1 K. & J. 392; Att. Gen. *v.* Metropolitan Board of Works, 1 Hem. & M. 312; Hepburn *v.* Lordan, 2 Id. 345; Kerr on Injunctions, 252. See, however, Gale *v.* Abbot, 8 Jur. N. S. 987; Child *v.* Douglas, Kay, 578.

[3] See Bonner *v.* Gt. Western Ry. Co., 24 Ch. D. 1, and the remarks of Fry, L. J., on page 10.

to prevent injuries to property which are imminent, irreparable, and for which damages furnish an entirely inadequate redress. With the single exception of the writ of estrepement, no common-law process exists by which injuries to property can be *prevented* as distinguished from being *redressed;* and hence the equitable remedy by injunction possesses a peculiar value, as furnishing a kind of relief which can be obtained in no other *forum*. No remedy, either at law or in equity, can compare with the injunction in promptness and completeness; and hence no equitable remedy has been so frequently or extensively called into play, or has contributed so much to the extension of the jurisdiction of courts of chancery.[1]

The remedy afforded by the civil law which approaches most nearly to that given by the injunction, was the *interdict* and action founded thereon. These interdicts were under prætorian authority, and were pronounced by the prætors by virtue of their extraordinary jurisdiction, and in mitigation of the severity which had resulted from an undeviating adherence to the technical forms of the civil law.[2]

Injunctions are of very early occurrence in the history of the English law. Mr. Spence gives an instance of an injunction issued in the reign of Henry I.;[3] and several cases of injunctions are to be found in the Chancery Calendar.[4]

403. Besides the classification into mandatory and prohibitory, there are several other divisions of injunctions.

Injunctions are either interlocutory or perpetual.[5] An interlocutory injunction is one granted upon preliminary application (generally when the bill is filed), and before final hearing. It is

[1] But the operation of this remedy must be confined within proper limits. An injunction, for example, will not be granted the effect of which is to tie up a man's entire property; Erwin's Appeal, 1 Norris (Pa.) 188; or which will restrain public works, unless the clearest abuse is proved; Wheeler *v.* Rice, 2 Id. 232; Moore *v.* Atlanta, 70 Ga. 611.

[2] See Joyce on Injunctions, 2, note.

[3] Spence Eq. 108, note *a*. The writ ran as follows: "Henricus Rex Anglorum Haimoni Dapifero et Hugoni de Bock, salutem. Prohibeo ne piscatores pescant in Tamesia, ante piscaturam de Rovecestra De Nivvera, et si ulterius invenientur piscantes, sint mihi forisfacti."

[4] The Burgesses of East Retford *v.* Thomas de Hercy, Chan. Cal. ix. and x.; Astel *v.* Causton, Id. cviii.; Edyall *v.* Hunstan, Id. cxiii.; Peverell *v.* Huse, Id. cxxii.; Royall *v.* Garter, Id. cxxx.; Hoigges *v.* Harry, Id. xxiv.; *ante*, p. 11, 12.

[5] Kerr on Injunctions, Chap. II.

provisional merely, and concludes no rights. A perpetual injunction, on the other hand, is made only on final decree, and is an adjudication upon the merits of the controversy. It constitutes, in fact, the decree, or part of the decree, in the cause.[1]

404. Injunctions are either *ex parte*, that is, granted upon the application of the plaintiff, without the defendant being heard; or are such as are granted upon hearing both plaintiff and defendant.[2] An *ex parte* injunction is only granted where, in urgent cases, delay might produce irreparable injury to property, or in similar cases to restrain proceedings at law. It may be granted before the defendant's appearance and without notice to him.[3] The defendant, however, is always given an early opportunity to come in and move to dissolve the injunction.

It is to be observed, moreover, that after bill filed the defendant proceeds at his peril, and has no ground to complain if, by the decree, he is compelled to undo that which has been done after the institution of the suit. Thus, in Clark *v.* Martin,[4] a motion was made to restrain the carrying up a single-storied back building of a house two stories higher. The motion was refused, and the building went on and was completed. On appeal, however, the injunction was granted, and the effect of this was to compel the tearing down of the additional stories.[5]

405. Again: injunctions are (or rather *were*) either common or special. The common injunction was one which was granted in aid of or secondary to another equity, as in the case of injunctions to restrain proceedings at law, and it issued of course upon the coming in of the bill, without notice.[6] As soon, however, as the defendant files his answer, he may move to dissolve the injunction; and it is then a question for the discretion of the court whether, on the facts disclosed by the answer, or, as it is technically termed, upon the equity confessed, the injunction shall be at once dissolved, or whether it shall be continued to the hearing.[7]

[1] See Kershaw *v.* Thompson, 4 Johnson Ch. 610.

[2] Joyce on Injunctions, 1.

[3] Id. 2.

[4] 13 Wright, 289.

[5] See, also, Western *v.* McDermott, L. R., 2 Ch. 72; Durell *v.* Pritchard, L. R., 1 Ch. 244; Yates *v.* Jack, Id. 295; Warren & Franklin Railway Co. *v.* Clarion Land Co., 4 P. F. Sm. 38.

[6] High on Injunctions, § 6.

[7] Hoffman *v.* Livingston, 1 Johns.

If the common injunction is obtained before the declaration has been filed in the action at law which the injunction seeks to restrain, it stays all further proceedings in that action. If obtained under the declaration, the defendant (the plaintiff in the action at law) is permitted to go on to judgment, but the injunction stays the execution. If the defendant requires discovery to aid him in the trial at law, proceedings will be stayed on special application, until the coming in of the answer.[1]

The common injunction has been practically abolished in England; as such injunctions are no longer of course, but are granted only upon a bill which makes out a *prima facie* case, and which must be supported by affidavit.[2] In the United States, as a general rule, the common injunction does not exist; but all injunctions are granted on the merits.[3]

Special injunctions are those which are granted upon the merits as disclosed by affidavits. The allowance of a special injunction rests in the sound discretion of the court. It is granted only on special application, though it may be *ex parte;* and it is usual in the United States to require security before issuing the writ.[4]

406. The nature of the writ of injunction having been thus briefly noticed, the occasions for the exercise of this equitable remedy must be considered.

The object of the remedy being to prevent an infringement of *rights*, the general division of the subject may naturally be into those cases in which the writ issues for the purpose of protecting equitable rights, and those in which it issues for the purpose of preventing injury to legal rights.[5]

The first class of cases may be subdivided into those in which

Ch. 211; Roberts *v.* Anderson, 2 Id. 202.

[1] Adams's Doct. of Equity, 195.

[2] Stat. 15 and 16 Vic., c. 86, § 58 (Chancery Procedure Act, 1852); Smith's Manuel of Equity, 411; Joyce on Injunctions, 1.

[3] Buckley *v.* Corse, Saxton, 504; Perry *v.* Parker, 1 Wood. & Min. 280; High on Injunctions, § 6.

[4] High on Injunctions, Chap. XXI.; Daniels' Chan. Prac. 1776. See Bein *v.* Heath, 12 Howard, 168. Instances may occur in which it is not necessary to give security; Dodd *v.* Flavell, 2 C. E. Green, 255.

[5] The statute in Pennsylvania authorizes the courts to restrain acts which are "contrary to law." It has been held that under this statute an injunction may issue to restrain acts which are contrary to "equity." Stockdale *v.* Ullery, 1 Wright, 486.

the writ issues for the protection of equitable rights by enjoining proceedings at law, whereby and wherein such rights may be violated or disregarded, and those in which the writ issues for the protection of such equities when injury is threatened by other means than through legal proceedings—as where the rights of legatees, partners, *cestui que trustent*, mortgagors and others, are in danger of being violated by the executor or administrator, co-partner, trustee, or mortgagee, as the case may be.

407. And first as to the protection of equitable rights by enjoining proceedings at law.

It is well established that equity will interfere to restrain proceedings at law, wherever through fraud, mistake, accident, or want of discovery, one of the parties in a suit at law obtains, or is likely to obtain, an unfair advantage over the other, so as to make the legal proceedings an instrument of injustice.[1] The ground of this interference is, that in order to do complete justice every part of the dispute between the parties should be passed upon.[2] Now, in the common-law courts, the rights of parties could, in many instances, receive only a partial consideration, as those courts could not adjudicate equities, and thus, only a part of the dispute could actually be decided. It was to afford a remedy to this wrong that chancery interfered and assumed jurisdiction to stay legal proceedings. This jurisdiction is exercised at any stage of the legal cause. Thus, an injunction is sometimes granted to stay trial; sometimes after verdict to stay judgment; sometimes after judgment to stay execution;[3]

[1] Earl of Oxford's Case, 1 Ch. Rep. 1; 2 Lead. Cas. Eq. 601 (4th Eng. ed.). See, also, Lyme *v.* Allen, 51 N. Hamp. 242; Ferguson *v.* Fisk, 28 Conn. 501; Weed *v.* Grant, 30 Id. 74; Dehon *v.* Foster, 4 Allen, 545; Hine *v.* Handy, 1 Johns. Ch. 6; Atlantic De Laine Co. *v.* Tredrick, 5 R. Island, 171; Smithurst *v.* Edmunds, 1 McCart. 408; Metler *v.* Metler, 3 C. E. Green, 270; 4 Id. 457; Worrell *v.* The Church, 8 Id. 96; Hall *v.* Piddock, 6 Id. 311; Lyon's Appeal, 11 P. F. Sm. 15; Wistar *v.* McManes, 4 Id. 324; Bulows *v.* The Committee of O'Neall, 4 Dessaus. 394; Vennum *v.* Davis, 35 Ill. 568; Davis *v.* Hoopes, 33 Miss. 173; Daniell's Chan. Prac. 1725. See Ochsenbein *v.* Papelier, L. R., 8 Ch. 695, where the application of the rule to proceedings on foreign judgments was discussed. The injunction in this case was refused. See upon this subject Dinsmore *v.* Newsheimer, 39 S. C. N. S. 204; High on Injunctions, Chap. II., § 2; and Hilliard on Injunctions, Chap. VI.

[2] Kerr on Injunctions, 13.

[3] Follansbee *v.* Scottish Am. Mtg. Co., 7 Ill. App. 498.

and sometimes after execution to stay the money in the hands of the sheriff if it is a case of *fieri facias*,[1] or to stay the delivery of possession if it is a writ of possession. It is usually granted on the application of the defendant, but the plaintiff may have an injunction, as where a verdict has been rendered against the plaintiff by inequitable means, he may come into chancery to prevent the entry of judgment, and to get a new trial.[2]

The right of the court of chancery to exercise this jurisdiction, especially after judgment, was the occasion of the well-known dispute in the reign of James I., between Lord Chancellor Ellesmere and Lord Chief Justice Coke. An action had been tried in the King's Bench, in which the plaintiff lost his verdict in consequence of one of his witnesses being artfully kept away. He then came into chancery, praying discovery from the defendant. The latter refused to answer and was committed to prison for contempt. Indictments were then preferred (at the instance of Coke) against the complainant and his counsel; but they were thrown out by the grand jury. The king then interfered in favor of the chancellor, and made an order on his council book, declaring that he had not exceeded his jurisdiction, and the parties who had preferred the indictment were prosecuted in the star chamber.[3]

Since this dispute the general right of chancery to interfere by injunction, for the purpose of preventing an inequitable use of legal process, has not been questioned in England, and the same rule exists in the United States.[4]

408. It is important to remember that in granting this relief, equity does not pretend or assume to interfere with another court. The injunction is in *personam* merely. It is directed to the *party*, not to the court or the officers thereof. It is not, in

[1] The common injunction, if obtained after declaration, did not stay proceedings at once, as the plaintiff in the common-law action was at liberty to go on until verdict and then stop. If the injunction was obtained before declaration, it stayed proceedings at once.

[2] Or a plaintiff may file a bill to restrain a defendant from setting up a plea. Stewart *v.* Railroad Co., 2 De G., J. & Sm. 319.

[3] Earl Oxford's Case, 1 Ch. Rep. 1; 2 Lead. Cas. Eq. 601 (4th Eng. ed.).

[4] See, on this subject, Hilliard on Injunctions, p. 187 *et seq.* (3d ed.). See case in C. P. of Chester Co., Pa., in the 17th century, cited in Mr. Lawrence Lewis, Jr.'s Essay in Hist. Soc. Mag. for July 1881, where a court sitting as a court of equity reversed the judgment which it had given as a court of law.

other words, a writ of prohibition.[1] An injunction, for example, restraining an execution, would not issue to the prothonotaries or clerks of the common-law court, wherein the judgment had been obtained, but to the plaintiff in the action, forbidding *him* to take any steps towards getting out a writ of execution, and disobedience to this injunction would be a contempt on the plaintiff's part and punishable accordingly.[2]

409. It is difficult to mark out with precision the exact limits within which a court of equity will interfere with proceedings at law. Some general principles, however, have been well established; and certain recognised cases exist in which the jurisdiction of chancery is assumed.[3]

It may be said on high authority that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself in a court of law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.[4] If the defence is equally available in a court of law, either by application to the court in which the judgment is rendered or by appeal,[5] and no special ground exists growing out of fraud or accident, equity will not interfere.[6] To warrant relief in equity against a judgment at

[1] Kerr on Injunctions, 14, 15. See Moore *v.* Browne, a case in the Register's Book of the Early Court of Chancery in the Colony of Pennsylvania, p. 31. Appendix to Rawle's Essay on Equity in Pennsylvania, p. 20.

[2] Wynn *v.* Newman, 75 Va. 811.

[3] Albright *v.* Oyster, 19 Fed. Rep. 849, and note.

[4] Marine Ins. Co. *v.* Hodgson, 7 Cranch, 332. In Brown *v.* Hurd, 56 Ill. 317, the plaintiff had lost a verdict in a common-law action through a failure of evidence. After the judgment in the common-law action, a statute was passed allowing parties to testify. The plaintiff then filed a bill in chancery for a new trial, alleging that he could, under the new law, make out his case. The relief, however, was refused. See also, Dodge *v.* Strong, 2 Johns. Ch. 228; Duncan *v.* Lyon, 3 Johns. Ch. 356; Thompson *v.* Van Beuren, Id. 395; Foster *v.* Wood, 6 Id. 87; Robinson *v.* Wheeler, 51 Id. 374; Cairo, &c., Rd. Co. *v.* Titus, 27 N.J. Eq. 102; Doughty *v.* Doughty, Id. 315; Walter *v.* Heller, 90 Ind. 198. See, however, Norton *v.* Woods, 5 Paige Ch. 249; and Miller *v.* McCan, 7 Id. 451. The court will not interfere merely because the judgment is *irregular;* Baker *v.* Morgans, 2 Dow, 526; Shottenkirk *v.* Wheeler, 3 Johns. Ch. 280; Life Ins. Co. *v.* Bangs, 103 U. S. 780; nor because the execution is irregular; Hastings *v.* Cropper, 3 Del. Ch. 165.

[5] Brown's App., 16 P. F. Sm. 157.

[6] Hendrickson *v.* Hinckley, 17 How. 443; Woodworth *v.* Van Buskerk, 1 Johns. Ch. 432; Baron de Worms *v.* Meiller, L. R., 16 Eq. 554; Bryan *v.*

law, it must be shown not only that injustice had been done, but that the defendant was not guilty of laches about his defence.[1] Thus, in Lansing *v.* Eddy, where a bill was filed to enjoin the collection of a judgment on the ground of usury, and for the *discovery* of the usury, Chancellor Kent refused an injunction, because the usury would have been a good defence at law, and no reason was given why the defendant in the judgment did not seek the discovery while the suit at law was pending. In the same case, also, the chancellor was asked to enjoin the execution because the judgment had been paid; but this was likewise refused, on the ground that the party alleged to be injured had a prompt and adequate remedy at law.[2] The principle is that, as between concurrent jurisdictions, that which first attaches will have the preference,[3] and the necessity for equitable interference has been very much lessened of late years, by the facility with which verdicts are set aside, new trials granted, and judgments opened in courts of common law.

In England, by the common-law procedure act of 1854, power is given to the common-law courts to entertain defences by plea on equitable grounds. But the powers given by this act are permissive only and not compulsory; and a party has the option either to avail himself of the equitable defence at law, or to go into chancery for relief.[4] He cannot, however, do both; and after he has once exercised his option by using an equitable plea at common law, and there is no reason why the court of law should not deal with the equitable plea as well as a court of equity, and give him the same relief as a court of equity, he cannot ask for an injunction on the very ground that he has made the subject of his equitable plea.[5] But if the court of

Long, 14 Florida, 366; Crim *v.* Handley, 4 Otto, 652; Minturn *v.* Farmers' Loan & Trust Co., 3 Comst. 498; Linn *v.* Neldon's Adm'rs, 8 C. E. Green, 169; Lyme *v.* Allen, 51 N. Hamp. 242; Olmsted's Appeal, 5 Norris, 284; Blair *v.* Reading, 99 Ill. 600.

[1] Dey *v.* Martin, 78 Va. 1.

[2] Lansing *v.* Eddy, 1 Johns. Ch. 49; Smith *v.* Lowry, Id. 320; Floyd *v.* Jayne, 6 Id. 479; Barker *v.* Elkins, 1 Id. 465; Holmes *v.* Remsen, 7 Id. 286; Roach *v.* Duckworth, 95 N. Y. 391.

[3] See Southeastern Railway Co. *v.* Brogden, 3 MacN. & G. 23; Hoare *v.* Brembridge, L. R., 8 Ch. 22; Conover *v.* The Mayor, 25 Barb. 513; Crane *v.* Bunnell, 10 Paige, 333; Simpson *v.* Hart, 1 Johns. Ch. 97.

[4] Gompertz *v.* Pooley, 4 Drewry, 448; Davies *v.* Stainbank, 6 De G., M. & G. 679; Kerr on Injunctions, 25, 26.

[5] Waterlow *v.* Bacon, L. R., 2 Eq. 514; Farebrother *v.* Welchman, 3 Drewry, 122.

law refuses to take cognisance of the equitable defence, on the ground that it is not within the statute, or the relief afforded is not adequate, or from the way in which the pleadings are framed, the case cannot be heard on its merits; equity, in such case, will interfere.[1]

It is a question of some doubt whether the assumption of equitable principles by common-law courts makes any difference in the right of courts of equity to interfere by injunction. It has been decided in New York and Vermont, that the execution of a judgment might be restrained on equitable grounds, although those grounds would, under the modern liberality of common-law courts, have been entertained at law, and would have constituted a good defence there. This line of decisions is based on the general doctrine that the jurisdiction of equity will not be ousted by any subsequent assumption of similar jurisdiction by common-law courts.[2] In other decisions a contrary rule has been held; and it has been decided that equity would not interfere where the defence might have been taken in the ordinary course of legal proceedings.[3] And where the powers of courts of common law to entertain equitable defences have been conferred by statute, the reason for the interference of chancery would seem no longer to exist.[4]

The fact, however, that a court of law has concurrent jurisdiction with a court of equity, will not prevent the latter from interfering wherever from the special circumstances of the case complete justice could not be done in a former tribunal.

410. The cases which warrant the interference of courts of equity with the parties to a legal proceeding, are co-extensive with the subjects of equitable jurisdiction. It may be said, generally, that an injunction will be granted to restrain an action at law wherever an equitable title is not recognised, or an equitable right not enforced, or where exact and complete justice would not be done between the parties by reason of the want of an equitable remedy. Thus, by running over the heads of equitable jurisdiction, which are pointed out in this work, it

[1] Magnay *v.* Mines Royal Co., 3 Drewry, 130; Evans *v.* Bremridge, 8 De G., M. & G. 100; Waterlow *v.* Bacon, L. R., 2 Eq. 514.

[2] King *v.* Baldwin, 17 Johns. 384; overruling Chancellor Kent in 2 Johns. Ch. 554; Viele *v.* Hoag, 24 Verm. 46.

[3] Dickerson *v.* The Commissioners, 6 Ind. 128.

[4] Winfield *v.* Bacon, 24 Barb. 154.

will be seen what are the occasions upon which the writ of injunction to stay proceedings at law may issue.

Thus, if a trustee were to assert his legal title by ejectment against the beneficial owner, equity would interfere by injunction. And the remedy applies to implied as well as express trusts.[1]

Equity will also restrain suits at law whereby or wherein the equitable titles growing out of mortgages, and the assignment of *choses in action*, are likely to to be disturbed or disregarded.[2]

411. It has been explained in a former part of this work that certain equitable rights or "equities" grow out of accident, mistake and fraud; and the nature of these different heads of jurisdiction, and the circumstances under which these equities will be enforced, were attempted to be pointed out and discussed. In addition to the general relief which is afforded by bills filed expressly to assert these equities, a court of chancery will interfere by injunction to restrain parties from asserting legal rights by action at law to the prejudice of equitable rights. Thus, if an instrument which forms the evidence of the title of a party, has been lost through accident, the relief required will obviously differ with the position of the plaintiff in respect to the property. If he is out of possession, he will obtain complete relief by filing a bill, because the decree will then be evidence of his title. But if he is in possession, and is the defendant in an action at law, the only relief which he needs is an order restraining the other party from setting up *his* title. This can be accomplished only by the writ of injunction; which may accordingly be obtained in such a case.[3] So also for the purpose of carrying out the general principle that equity will look with disfavor upon a contract which is illegal or against the policy of the law or the provisions of a statute and which has been already noticed under the head of Fraud, a court of chancery, where a judgment at law has been obtained in such a transaction, will prevent its

[1] Trenton, &c., *v.* McKelway, 4 Halst. Ch. 84; Somerville Com'rs. *v.* Johnson, 36 N. J. Eq. 211. See, also, for other instances of relief in cases of trust, Hunt *v.* Freeman, 1 Hammond, 490; Symons *v.* Reid, 5 Jon. Eq. 327; North Am. Coal Co. *v.* Dyett, 7 Paige, 1; Kerr on Injunctions, Ch. XI.

[2] Kerr on Injunctions, Chap. XIV. See, also, Hubbard *v.* Jasinski, 46 Ill. 160; Clagett *v.* Salmon, 5 Gill & Johns. 314; Curd *v.* Wunder, 5 Ohio St. 92; Smithurst *v.* Edmunds, 1 McCart. 408.

[3] See Maps *v.* Cooper, 39 N. J. Eq. 316.

[4] See Butch *v.* Lash, 4 Iowa, 215.

enforcement by injunction.[1] These instances will serve to show the necessity for this species of equitable remedy in the three cases of accident, mistake and fraud. It may be added here that to obtain complete justice it is sometimes necessary that the re-execution or reformation of documents should be ordered, or that instruments should be delivered up and cancelled. This subject will be noticed in the succeeding chapter.

The writ of injunction is also used for the purpose of protecting and enforcing the equities of notice, estoppel, conversion, election and adjustment, wherever those rights are in danger of being injuriously affected by the proceedings of a common-law court. Thus a party may be restrained by injunction from asserting in an action at law a legal title against an equitable title of which he had notice; or from setting up some right or title from the enforcement of which he ought to be estopped in equity by some previous conduct or action on his part; or from violating in common-law actions rights acquired under the equitable doctrines of conversion and election; or from disturbing those rights and duties which grow up under the general head of adjustment, and exhibit themselves in the equities of subrogation, exoneration, contribution and marshalling.[2]

412. Injunctions to restrain proceedings at law are granted not only in those cases in which equitable titles or equitable rights are in danger of being disregarded, but, also, in some instances where more complete justice between the parties may be effected by an equitable remedy. Thus a man against whom an action has been brought for a matter of account, or for that which is the result of an account, has a right, on making out a proper case, to ask a court of equity to have an account there taken, on the ground that the remedy at law is less complete than the remedy in equity. As a corollary to this right the complainant has the further privilege of asking for an injunction to restrain the common-law court from proceeding with the action of account—if any has been there instituted.[3]

So, too, where one of the parties to a common-law action desires to obtain discovery from his adversary, the jurisdiction

[1] Skipwith *v.* Strother, 3 Rand, 214; Mallett *v.* Butcher, 41 Ill.. 382; Lucas *v.* Nichols, 66 Id. 42; *ante*, § 223.

[2] Ferrin *v.* Errol, 59 N. H. 234.

[3] See Joyce on Injunctions, 1053 (Part II.); note to Earl of Oxford's Case, 2 Lead. Cas. Eq. 613 (4th Eng. ed.).

[4] Anderson *v.* Noble, 1 Drewry, 143.

of a court of chancery will be exercised to restrain the other party from proceeding with the action until discovery is obtained.[1]

When the equitable remedy by specific performance has been invoked, the court will not permit an action at law to proceed for the same subject-matter, and the complainant, therefore, will be restrained from proceeding at law for damages.[2] The defendant in the suit may also, by injunction, be restrained from withdrawing the subject of the bill from the jurisdiction of the court; as where (for example) a bill is filed for the specific performance of the sale of a ship, she may be restrained from leaving port.[3]

A court of equity will not enjoin criminal proceedings.[4]

413. A court of equity frequently interferes by injunction to restrain proceedings at law for the purpose of preventing unnecessary or vexatious litigation. This it does by compelling a party to elect between two remedies; by restraining a party from bringing an action in another court after a court of equity has once obtained possession of a cause; by putting a stop to repeated attempts to litigate the same question; and by interfering to protect a party who is liable to discharge some debt, duty or obligation from vexatious suits, by two or more parties severally claiming to be entitled to the benefit of such debt, duty or obligation.

As to the first of the above instances of equitable interference, it will be sufficient to say, that a court of chancery will not permit a man to proceed both at law and in equity at the same time in respect to the same demand, but will compel him to elect in which court he will proceed.[4] To this rule there appears to be but one exception—viz., the case of a mortgagee who is entitled to enforce all his remedies at once. He may foreclose

[1] Wynne *v.* Jackson, 2 Russ. 351; Ld. Portarlington *v.* Soulby, 3 M. & K. 104; Kerr on Injunc. 27, 28.

[2] Duke of Beaufort *v.* Glynn, 3 Sm. & Giff. 213; Reynolds *v.* Nelson, 6 Madd. 18; Prothero *v.* Phelps, 2 Jur. N. S. 173. The action may sometimes be directed to stand, with leave to the plaintiff to proceed if specific performance be refused.

[3] Hart *v.* Herwig, L. R., 8 Ch. 860. See, also, Home Ins. Co. *v.* Howell, 9 C. E. Green, 238.

[4] Porter *v.* Fall, 34 Ark. 375, and see *post*, § 424.

[5] Hogue *v.* Curtis, 1 J. & W. 429; Fennings *v.* Humphery, 4 Beav. 1; Kerr on Injunctions, 103.

the mortgage, and, at the same time, proceed upon the accompanying bond.[1]

414. After a court of equity has once got possession of a cause, it will not suffer any of the litigating parties to resort to another tribunal. Either a plaintiff or defendant who attempts to do so, may be restrained by a motion in the cause.[2] Thus a man who has filed a bill for specific performance is bound to submit his claim for damages to the judgment of the court, and may not proceed at law otherwise than by leave of the court.[3] And so, also, in a suit for the administration of assets, after a decree has been made, the court will not suffer a creditor to institute proceedings at law. Before a decree is made, under which a creditor may come in and prove his debt, the court will not hinder a creditor from pursuing his legal remedies. But, after such a decree is entered, he may be restrained from the action at law.[4]

415. Equity interferes by injunction to restrain repeated attempts to litigate the same right. Cases of this kind are usually grouped together in one class, under the head of bills of peace. These bills of peace are of two kinds, and are filed either (first) to prevent the vexatious recurrence of litigation by a numerous class insisting upon the same right; or (second) to prevent the same individual from reiterating an unsuccessful claim.[5]

Bills of peace of the first class occur where there is one general common right to be established against several or a number of distinct persons, whether one person claims or defends a right against many, or many claim or defend a right against one. In such a case a court of equity will interfere to prevent multiplicity of suits, and instead of suffering parties to be harassed by a number of separate suits, each of which only decides the particular right in question between the plaintiff and defendant thereto, will at once determine the general right by decree.[6] The instance of such bills, usually given, are where the lord of a

[1] Schoole *v.* Sall, 1 Sch. & Lef. 176; Taylor *v.* Waters, 1 My. & Cr. 266; Kerr on Injunctions, 105, 106.

[2] Reynolds *v.* Nelson, 6 Madd. 18; Frank *v.* Basnet, 2 My. & K. 618. See, also, Spink *v.* Francis, 19 Fed. Rep. 670.

[3] Reynolds *v.* Nelson; Frank *v.* Basnett, *supra.*

[4] Kerr on Injunctions, 107.

[5] Adams's Doct. of Equity, 199.

[6] Cadigan *v.* Brown, 120 Mass. 493.

manor claims a right against the tenants, or the tenants claim a common right against the lord; or where a parson claims tithes against his parishioners, or the parishioners allege a modus against the parson.[1]

416. An instance of a more practical character, in modern times, occurred in the case of the Sheffield Water-works *v.* Yeomans.[2] The reservoir of the Sheffield Water-works had burst and occasioned an inundation, by which the property of a large number of persons had been injured. Under an act of Parliament, passed to meet the case, certificates for costs were to be issued to the property-owners, which entitled the holder, after compliance with certain formalities, to a claim against the company in the nature of a judgment. A difference of opinion afterwards arose between the commissioners as to whether their powers had not expired; and a large number (1500) of certificates were delivered by some of the commissioners to Yeomans, who was the town clerk, for distribution. A bill was then filed against Yeomans and five of the persons named in the certificates on behalf of themselves and of all others; and a demurrer to this bill was overruled. "It seems to me," said Lord Chancellor Chelmsford, "to be a very fit case, by analogy at least, to a bill of peace, for a court of equity to interpose and prevent the unnecessary expense and litigation which would be thus occasioned, and to decide, once for all, the validity or invalidity of the certificates upon which the rights of all the parties depend."[3]

417. In general, in order that a bill of peace may be maintained, the complainant must first have established his right at law; and a court of equity will, if necessary, direct an issue to be tried for this purpose.[4]

To sustain a bill of peace the right must be one common to all; hence such a bill will not lie against independent trespassers who have no common claim—as, for example, against several

[1] Adams's Doct. of Equity, 199.

[2] L. R., 2 Ch. 8.

[3] Id. 11.

[4] Tenham *v.* Herbert, 2 Atk. 484; Mitford's Pl. 169; Eldridge *v.* Hill, 2 Johns. Ch. 281; Bond *v.* Little, 10 Georgia, 395; Morgan *v.* Smith, 11 Ill. 194; Gunn *v.* Harrison, 7 Alab. 585; Lowe *v.* Lowry, 4 Ham. 77; Harmer *v.* Gwynne, 5 McLean, 313; Paterson, etc., R. R. Co. *v.* Jersey City, 1 Stockt. 434; Smith *v.* McConnell, 17 Ill. 135.

booksellers who have infringed a copyright, or against several persons who have at different times obstructed a ferry [1]

Nor will a bill, in the nature of a bill of peace, lie to enjoin the enforcement of a tax under the revenue laws, in favor of a number of persons, joined as complainants, whose only interest in common is in resisting the tax, they having no common interest in the subject on which it is levied.[2]

When a bill of peace is filed for the purpose of establishing a right in which many are interested, it must be filed on behalf of all, and will not lie to establish the right of the complainant only.[3]

Thus one commoner may file a bill on behalf of himself and of all others to establish a right of common, as against the lord; but he cannot file a bill to establish simply his individual right. The answer to such a complainant is: "If this is a disturbance of your common, why do you not bring your action? You may maintain an action; prove your right of common, prove that the lord has invaded that right, and you will recover at law."[4]

It is enough, however, if one general question exists which is to be determined. Thus, where a person was in possession of land with a complete legal title, though not all appearing of record, it was held that he was entitled to an injunction to restrain a number of ejectment suits brought against him as to a portion of the premises, since the question was the same as to all of the premises, and might be determined by the proceeding in chancery.[5] But where the relief can be equally afforded by a

[1] Adams's Doct. of Eq. 200. See, also, Randolph *v.* Kinney, 3 Rand. 394; Miller *v.* Grandy, 13 Mich. 540; McHenry *v.* Hazard, 45 Barb. 657.

[2] Cutting *v.* Gilbert, 5 Blatch. 259; Schulenberg-Boeckler Lumber Co. *v.* Hayward, 20 Fed. Rep. 422; High on Injunctions, 213.

[3] Phillips *v.* Hudson, L. R., 2 Ch. 243.

[4] Id. See, also, Eldridge *v.* Hill, 2 Johns. Ch. 271; Denton *v.* Jackson, Id. 320 (where it was held that one inhabitant could not file a bill on behalf of *the town*); Tenham *v.* Herbert, 2 Atk. 483; Cowper *v.* Clerk, 3 P. Wms. 155; High on Injunctions, § 54.

[5] Woods *v.* Monroe, 17 Mich. 238. It is a well-established rule in equity pleading, that in certain cases bills may be filed by one or more persons on behalf of themselves and all others standing in a similar position and claiming the same right. Such are creditors' bills, and bills filed by one or more stockholders in or creditors of a company against projectors or directors,. See Watts's Appeal, 28 P. F. Sm. 370; Spering's Appeal, 21 Id. 24; Warner *v.* Hopkins, 111 Pa. St. 332, and Story's Equity Pleading, §§ 97–136, where the subject is discussed.

court of law by means of an order consolidating the suits, an injunction will be refused.[1]

418. Bills of peace of the second class, viz., those wherein the plaintiff seeks to restrain the defendant from reiterating an unsuccessful claim, originated in the fact that a verdict in an action of ejectment was not conclusive upon the rights of the real parties to the controversy, and successive actions might, therefore, be brought indefinitely upon the same title. In some of the United States this rule has been altered, and two verdicts in favor of the same title are deemed conclusive upon the right. In order, however, to remedy the evil as it existed at common law, chancery entertains a bill to enjoin further litigation, after repeated trials at law. This jurisdiction was established by a case in the House of Lords, and is now unquestionable.[2] But where the causes of action are different, equity will not interfere, although the question may be the same.[3]

419. The only instance wherein a court of equity interferes to prevent vexatious litigation, which yet remains to be noticed, is the case wherein a bill is filed to protect a party who is liable to discharge some debt, duty or obligation from suits by two or more persons severally claiming to be entitled to the benefit of such debt, duty or obligation. Bills for this object are called bills of interpleader. The ground upon which this jurisdiction rests is that a mere stakeholder ought to be protected as against conflicting claimants.[4] The justice of this rule was recognised at common law, but its application was exceedingly limited,

[1] Peters *v.* Prevost, 1 Paine, C. C. 64.

[2] Earl of Bath *v.* Sherwin, 4 Bro. P. C. (Tomlin) 373. See, also, Barefoot *v.* Fry, Bunb. 158; Letton *v.* Goodden, L. R., 2 Eq. 123; Marsh *v.* Reed, 10 Ohio, 347; Craft *v.* Lathrop, 2 Wall. Jr. 103; Dedman *v.* Chiles, 2 Monr. 426; Patterson, etc., Rd. *v.* Jersey City, 1 Stockt. 434; Thompson's App., 107 Pa. St. 559; Nicoll *v.* The Trustees of Huntingdon, 1 Johns. Ch. 166; Third Avenue Rd. *v.* New York, 54 N. Y. 159; Patterson *v.* McCamant, 28 Missouri, 210.

[3] Mount Zion *v.* Gillman, 9 Biss. 479.

[4] Crawshay *v.* Thornton, 2 My. & Cr. 1; Kerr on Injunctions, 118 *et seq.*; Farley *v.* Blood, 10 Foster, 354; Bedell *v.* Hoffman, 2 Paige Ch. 199; Cady *v.* Potter, 55 Barb. 463; Lincoln *v.* Rutland Rd., 24 Verm. 639; Morse *v.* Stevens, 131 Mass. 389; Mount Holly Co. *v.* Ferree, 2 C. E. Green, 117; Hastings *v.* Cropper, 3 Del. Ch. 105, Strange *v.* Bell, 11 Georgia, 103; Burton *v.* Black, 32 Id. 53; Conley *v.* Alabama Gold Life Ins. Co., 67 Alab. 472; Hathaway *v.* Foy, 40 Missouri, 540.

being confined to the old actions of *quare impedit*, and writ of right of ward, and to the single personal action of detinue, and then only in the two cases of bailment and accident.[1]

The right of interpleader at law has been extended in England[2] and in many of the United States by statute; but in some of the States the remedy is in equity alone, and in others the equitable remedy is necessarily invoked in some cases.[3]

420. A bill of interpleader must show title in two claimants. Thus, a sheriff who seizes goods on execution cannot file a bill of interpleader to determine adverse claims existing to the property; for the defendant in the execution has no right to hold against the sheriff's levy; whereas, so far as the adverse claimant is concerned, the sheriff is simply a wrongdoer. It has, therefore, been found necessary to protect sheriffs under these circumstances by special statutes.

But where the contest is between the execution-creditor and

[1] Story's Equity Jurisp., §§ 801–804. The common-law process of garnishment was in the nature of an interpleader. It arose in this way: When deeds were deposited in the hands of a third person to await the performance of covenants, or the doing of some act upon which they were to be redelivered to one or other of the parties, actions of detinue were often brought against the depository, whenever the crisis happened for the deeds being demandable according to the terms of the agreement on which they were deposited. In these actions the defendant would be driven to call in the other party to the agreement and deposit, that the re-delivery might be made to the person who had a legal right to call for it from the defendant. Thus, in an action of detinue for such deeds delivered by the plaintiff to the defendant to be re-delivered, the defendant would plead that they were delivered by the plaintiff and one J. N. upon certain conditions, and he did not know whether the conditions were performed; therefore he prayed *garnishment* against J. N., that is, that J. N. might be summoned to show whether there had been a performance of the conditions. Upon this a *scire facias* would issue against J. N., who, under the name of *garnishee*, became defendant in the suit, the first defendant being considered as out of court by the garnishment. 2 Reeves's Hist. Eng. Law, pp. 635, 636 (Finlason's ed.).

[2] 1 & 2 Wil. IV., c. 58; 1 & 2 Vic., c. 45, § 2; 23 & 24 Vic., c. 126, § 12. See Best *v.* Hayes, 1 Hurl. & Colt. 718; Tanner *v.* European Bank, L. R., 1 Exch. 261; Kerr on Injunctions, 120. If one of the claims is legal, and any other equitable, the remedy is exclusively in equity. Kerr on Injunc. 120.

[3] See Ramsdell *v.* Butler, 60 Me. 216, where the reasoning of the court would seem to do away with the necessity for bills of interpleader *as filed by the stakeholder*, and render it obligatory upon one of the claimants to resort to equity. But the correctness of this view may well be doubted.

a party who claims title to the *fund* realized by a sheriff, a bill of interpleader will lie. Thus, in Child *v.* Mann, the sheriff, who was in possession of goods under a *fieri facias*, was served with notice of an adjudication in bankruptcy against the debtor, and notice by the assignee to quit possession. The execution-creditor then obtained an order on the sheriff to make return of the writ, and the sheriff then sold the goods. It was held that the sheriff was entitled to file a bill of interpleader against the assignee and the plaintiff in the execution.[1]

An agent or attorney cannot compel his principal and a third party to interplead, nor can a tenant maintain an interpleader bill against his landlord and a stranger; the reason in these cases being that the attorney, or agent, or tenant cannot be permitted to controvert the title of the party under whom he holds.[2] The possession of a tenant is the possession of the landlord, and it would be exceedingly unjust and vexatious to allow the tenant to put his landlord on the same footing as a stranger. But a tenant may always show that his landlord has parted with his title, and hence he may file a bill of interpleader against his landlord, and one who claims derivatively from the landlord by a conveyance subsequent to the commencement of the tenancy.[3]

Nor will a bill of interpleader lie by a debtor against his creditor and a third person who claims the debt, not through any privity with the creditor but by a title paramount to his.[4]

421. A bill of interpleader will not lie where the plaintiff claims an interest in the subject-matter himself.[5] Thus, if an action is brought against an auctioneer for a deposit, he cannot maintain a bill of interpleader if he insists upon retaining either his own commission or the duty.[6]

So, also, where an interpleader bill alleged that the interest

[1] Child *v.* Mann, L. R., 3 Eq. 806.

[2] Cook *v.* Rosslyn, 1 Giff. 167; Crane *v.* Burntrager, 1 Cart. 165; Whitewater, &c., Co. *v.* Comegys, 2 Id. 469; Nickolson *v.* Knowles, 5 Madd. 47; Kerr on Injunctions, 122.

[3] Crawshay *v.* Thornton, 2 My. & Cr. 1, 21; Stuart *v.* Welch, 4 Id. 305; Ketcham *v.* Brazil Block Coal Co., 88 Ind. 515.

[4] Third Nat. Bank *v.* Skillings Lumber Co., 132 Mass. 410.

[5] Dohnert's App., 14 P. F. Sm. 311; Bridesburg Manuf. Co.'s App., 10 Out. (106 Pa. St.) 275; Killian *v.* Effingham, 110 U. S. 568.

[6] Mitchell *v.* Hayne, 2 Sim. & St. 63.

on a sum secured by a policy is not due from the company by whom the bill was filed, it was held not sustainable.[1]

It is not necessary that the title of both the claimants be legal; one title may be legal and one equitable, or both equitable.[2] It is essential to an interpleader that the party seeking relief should have incurred no independent liability to either party, and should have acknowledged the title of neither. If he has come under any personal obligation to either of the claimants in respect of the specific property in dispute, independently of the question of title, so that the whole of the rights claimed by the defendants cannot be properly determined by litigation between them, it is not a proper case for interpleader.[3] The cases of landlord and tenant, and principal and agent, already stated, are illustrations of this rule.

422. It is also essential that the debt duty, or thing claimed by both parties, should be the same. Thus, where a purchaser of tea was sued by the seller for the price, and was also sued in trover by the person who alleged himself to be the real owner, it was held not to be a case of interpleader, for the parties were not seeking the same thing. The one was endeavoring to obtain the price of the goods, the other damages for their conversion.[4]

So, also, where an auctioner, by direction of the owner, had sold to two persons successively, and had received a deposit from each, it was held that the auctioneer could not support a bill of interpleader against the owner and the two purchasers, because, although there was one question in common between the purchasers, viz., which was to be the purchaser of the estate, their claims against the auctioneer were for two different things, viz., by each for his own deposit. The bill was, therefore, dismissed as against the second purchaser with costs, and it was decreed that the seller and the first purchaser should interplead as to the first deposit.[5]

[1] Bignold *v.* Audland, 11 Sim. 23.

[2] See Hamilton *v.* Marks, 5 De G. & Sm. 638; Lozier's Ex'rs. *v.* Van Saun's Adm'rs., 2 Green Ch. 325; Yates *v.* Tisdale, 3 Edw. Ch. 71.

[3] Crawshay *v.* Thornton, 2 My. & Cr. 1; Pearson *v.* Cardon, 2 Rus. & Myl. 606; Cochrane *v.* O'Brien, 2 Jo. & Lat. 380; Desborough *v.* Harris, 5 De G., MacN. & G. 439, 455.

[4] Slaney *v.* Sidney, 14 Mees. & Wels. 800.

[5] Hoggart *v.* Cutts, Cr. & Ph. 197.

It is not necessary to sustain a bill of interpleader that an action be actually commenced. It is sufficient if claims have been made against the complainant, and he is threatened with a double litigation.[1]

When the complainant's right to interpleader is established either by admissions in the answer or by proofs,[2] he is dismissed with the costs of his litigation, which are to be paid out of the fund, and the conflicting claims of the defendants are then disposed of in the manner best adapted to the circumstances of the case. The bill is considered as putting the defendants to contest their respective claims just as a bill by an executor or trustee to obtain the direction of the court upon the adverse claims of the different defendants. If, therefore, at the hearing the question between the defendants is ripe for a decision, the court decides it; if not, it directs an action or an issue, or a reference to a master, as may be best suited to the nature of the case. An issue or a reference is generally the most cheap and efficacious mode of settling the controversy between the defendants: and the expense of an action at law or of an original bill to be filed under the direction of the court can seldom be necessary.[3]

423. Under the act of Congress of March 2, 1867, to "Establish a Uniform System of Bankruptcy throughout the United States," injunctions may be granted to stay proceedings at law, both for the benefit of the creditors of the debtor, and for the benefit of the debtor himself. Thus the federal District Courts may interfere, by injunction, in cases of involuntary bankruptcy, to restrain the debtor and any other person, during the pendency of the rule to show cause, from making any transfer or disposition of the debtor's property, and from any interference therewith; and the circuit courts have the power to hear and determine as courts of equity all cases and questions arising

[1] Richards *v.* Salter, 6 Johns. Ch. 445; Kerr on Injunctions, 120.

[2] Statham *v* Hall, Turn. & Russell, 30.

[3] City Bank *v.* Bangs, 2 Paige's Ch. 572; Atkinson *v.* Marks, 1 Cowen, 696; Jones *v.* Gilham, Cooper's R. 49. (see Hendry *v.* Key, 1 Dickens, 291 n.); Brymer *v.* Buchanan, 1 Cox Ch. Cas. 425; Duke of Bolton *v.* Williams, 4 Bro. C. C. 297; Hodges *v.* Smith, 1 Cox Ch. 357; Angel *v.* Hadden, 16 Ves. 203. Aldridge *v.* Thompson, 2 Bro. C. C. 149.

under the act.[1] Under these sections a creditor may be restrained from using the process of State courts, where its use would violate or defeat the provisions of the bankrupt act. As, for example, if a plaintiff in a judgment were proceeding by execution, when the judgment was confessed, or the levy thereunder procured to be made with the knowledge on the part of the plaintiff that the defendant was insolvent, or in contemplation of insolvency, and with the intent to give a preference, or to defeat or delay the operation of the act. This jurisdiction may be exercised sometimes by the District Court under the provisions of the 40th section, and sometimes by the Circuit Court by virtue of the equity powers conferred by the 2d section.[2]

An injunction to restrain an action at law may also be obtained for the benefit of the bankrupt, by virtue of the provisions of the 21st section of the act, which provides that no creditor whose debt is provable under the act shall prosecute to final judgment any suit at law or in equity therefor, until the question of the debtor's discharge shall have been determined. Before the election of an assignee this injunction can be obtained only by the bankrupt; after such election the assignee is the proper party to apply.[3]

424. Before leaving the subject of injunctions to restrain proceedings at law, it will be proper to say a few words as to the question "what are the courts in which proceedings will be restrained?"

Equity will interfere not only in proceedings in common-law courts, but also to restrain parties to proceedings in ecclesiastical courts,[4] in courts of admiralty,[5] in foreign courts,[6] and in courts

[1] Act of Congress of March 2, 1867, 14 Stat. at Large, 518, §§ 2 and 40. See Bump's Law of Bankruptcy, 43, 446 (10th ed.).

[2] Irving *v.* Hughes, 7 Am. Law Reg. (N. S.) 209; High on Injunctions, Chap. IV. See, under the English act, Ex parte Rumboll, L. R., 6 Ch. 842.

[3] Brightly's Bankrupt Act, 49.

[4] Hill *v.* Turner, 1 Atk. 515.

[5] Glascott *v.* Lang, 3 My. & Cr. 451; 2 Phillips, 310; Jarvis *v.* Chandler, T. & R. 319.

[6] Lord Portarlington *v.* Soulby, 3 My. & K. 108 (disapproving of Lowe *v.* Baker, Freem. 125); Bunbury *v.* Bunbury, 1 Beav. 318; The Carron Iron Co. *v.* Maclaren, 5 H. L. Cas. 416; Graham *v.* Maxwell, 1 MacN. & G. 71; Baillie *v.* Baillie, L. R., 5 Eq. 175; Hope *v.* Carnegie, L. R., 1 Ch. 320; Dehon *v.* Foster, 4 Allen, 545; Great Falls Co. *v.* Worster, 3 Foster, 462. In Liverpool, etc., Co. *v.* Hunter, L. R., 4 Eq. 62, and In re Chapman, L. R., 15 Eq. 75, an injunction was, under the circumstances, refused.

of bankruptcy to the extent of restraining a party from commencing proceedings in bankruptcy,[1] but not to the extent of interfering with the distribution of the bankrupt's estate after the jurisdiction of the bankrupt court has once attached.[2] Nor will a court of chancery restrain proceedings in a court of admiralty, where the latter tribunal has full power and jurisdiction to examine the matter.[3]

Proceedings in criminal courts will not be interfered with by injunction, unless the proceedings are commenced by a person who is also plaintiff in equity, relative to the same matter.[4]

Courts of equity are, in general, unwilling to interfere with tribunals which derive their authority from a distinct and independent source. For instance, a court of one State is slow to interfere with the tribunals of a sister State, and federal courts with State courts.[5] But this is a rule of comity only, and cannot, therefore, be regarded as a principle to which courts of equity would feel bound under all circumstances to adhere.

A court of equity may sometimes restrain proceedings in another court of equity.

Thus, where there were two claimants of a fund, and one filed a bill against the stakeholder without making the other a party, the stakeholder was held to be entitled to file an interpleader bill, and restrain the proceedings in the former suit.[6]

Tax officers are frequently restrained from levying and collecting taxes; and the jurisdiction of chancery on this point is now undoubted.[7] There are, however, limits to this jurisdiction; and it has been held by the federal courts, that an injunction bill to restrain the collection of a tax cannot be maintained on

[1] Attwood *v.* Banks, 2 Beav. 192.

[2] Thompson *v.* Derham, 1 Hare, 358; Morley *v.* White, L. R., 8 Ch. 214.

[3] Anon., 3 Atk. 350.

[4] Holderstaffe *v.* Saunders, 6 Mod. 16; Mayor of York *v.* Pilkington, 2 Atk. 302; New Home Sew. Mach. Co. *v.* Fletcher, 44 Ark. 139. See, however, Atlanta *v.* Gate City Gas Co., 71 Ga. 106. See, also, Kerr *v.* Corp. of Preston, L. R., 6 Ch. D. 463, where Mayor of York *v.* Pilkington is criticised. For a discussion of the rule that courts of equity have no jurisdiction in matters of crime, see article in 18 Am. Law Rev. 599.

[5] Diggs *v.* Wolcott, 1 Cranch, 179; Hutchinson *v.* Green, 6 Fed. Rep. 833. The federal courts are forbidden to *stay proceedings* in any state court. Act of 1793, ch. 22, § 5; 1 Stat. at Large, 334.

[6] Prudential Insur. Co. *v.* Thomas, L. R., 3 Ch. 74.

[7] Burnet *v.* Cincinnati, 3 Ham. 72; Fremont *v.* Boling, 11 Cal. 380; Baltimore *v.* Porter, 18 Maryl. 284; Com. *v.* Supervisors, 5 Casey, 121; Miller *v.*

the sole ground of the illegality of the tax, but must present a case which falls within some recognised head of equity.[1]

In a proper case, however, relief will be granted; and this will be so not only where the property of the complainant himself is the subject of the tax, but also in those cases in which his sole interest is that of a tax-payer seeking to have the constitutionality of the tax settled.[2] Indeed, in some of the cases just referred to, a more liberal interpretation seems to be put upon the jurisdiction of chancery than in the decisions of the Supreme Court of the United States.[3]

A court of equity will also, at the suit of a tax-payer, restrain the illegal disposition of municipal or county monies, or the creation of an illegal debt which the tax-payer, in common with others, might be obliged to pay.[4]

A court of equity will not interfere to restrain the exercise of executive discretion.[5]

425. It was stated above that equitable rights are liable to be infringed in two ways, first (indirectly), by being disregarded in the proceedings at law, and secondly (directly), by some act injurious to the equity. Having noticed the first general class

Gorman, 2 Wright 309; Spencer *v.* School District, 15 Kans. 259; Webster *v.* Harwinton, 32 Conn. 13; Hilliard on Injunc. 504, *et seq.* (3d ed.).

[1] Hannewinkle *v.* Georgetown, 15 Wallace, 543; Dows *v.* Chicago, 11 Id. 108; State Railroad Tax Cases, 2 Otto, 575; Milwaukee *v.* Koeffler, 116 U. S. 219. See, also, Moores *v.* Smedley, 6 Johns. Ch. 27; Dodd *v.* Hartford, 25 Conn. 239; Green *v.* Mumford, 5 R. I. 478; Messeck *v.* Supervisors, 50 Barb. 190; Clinton School District's App., 6 P. F. Sm. 315; Howitt's App., 7 Norris, 55; Le Roy *v.* Corp. of N. Y., 4 Johns. Ch. 354; Fleming *v.* Mershon, 36 Ia. 413; Swinney *v.* Beard, 71 Ill. 27; Leitch *v.* Wentworth, Id. 146; McConkey *v.* Smith, 73 Id. 313. See Melvin *v.* Lisealy, 72 Ill. 63; Nunda *v.* Crystal Lake, 79 Ill. 311; Second Nat. Bk. of Titusville *v.* Caldwell, 13 Fed. Rep. 429, and cases cited in n. p. 441.

[2] Page *v.* Allen, 8 P. F. Sm. 345; St. Clair School Board's App., 24 Id. 252; Pittsburgh's App., 20 Id. 142. See also, Wheeler *v.* Philadelphia, 27 P. F. Sm. 338; Gould *v.* Mayor of Atlanta, 55 Ga. 678; Lewis *v.* Spencer, 7 West Va. 689; Schumm *v.* Seymour, 9 C. E. Green, 143; and Union Pac. Rd. Co. *v.* Cheyenne, 113 U. S. 525.

[3] On similar principles a man whose business is threatened to be interfered with by a board of health on the ground that it is a nuisance, may obtain an injunction. See Weil *v.* Record, 9 C. E. Green, 169; McIntyre *v.* Storey, 80 Ill. 127. See, however, Watertown *v.* Mayo, 109 Mass. 315.

[4] Crampton *v.* Zabriskie, 101 U. S. 601; New London *v.* Brainerd, 22 Conn. 552; The Liberty Bell, 23 Fed. Rep. 843.

[5] State of Mississippi *v.* Johnson, 4 Wall. 475. See, also, remarks of Agnew, J., in Patterson *v.* Barlow, 10 P. F. Sm. 74.

of cases, it will be desirable, now, to pass to a brief consideration of the second.

It may perhaps be stated as a general rule, that as a court of chancery will interfere to redress an injury to an equitable right, it will also interpose its preventive remedy by injunction whenever such rights are threatened. Thus equity will interfere to prevent a breach of trust; it will restrain an improper or imprudent disposition of trust assets on the application of the *cestui que trust*;[1] or a co-trustee may invoke the aid of the court to prevent a threatened breach of trust.[2] Injunction may, upon the same principles, be issued against executors, when the assets of an estate are endangered by their mismanagement.[3]

Equity will also interfere to protect the rights of the holder of an equitable title. Thus a creditor of a husband may be restrained from levying upon the separate equitable estate of a married woman;[4] and in Pennsylvania it has been held that the *feme* is entitled to the same protection in regard to her separate property under the Married Woman's Act.[5] This, however, is the rule only when the creditor is clearly and undeniably proceeding against right and justice, to use the process of the law to the injury of the wife, and it will not be applied to cases in which there is doubt and conflict.[6]

A mortgagee may ordinarily pursue all his remedies at once. It sometimes, however, happens that it would be inequitable to allow him to do so, and hence he will be restrained by injunction under certain circumstances from proceeding by ejectment against the premises, or personally against the mortgagor, as the exigencies of the case may require.[7]

426. Another class of cases in which equity will interfere by injunction, embraces disputes between partners. It may be stated, as a general rule, that a court of chancery has jurisdic-

[1] Elmendorf *v.* Lansing, 4 John. Ch. 565; Owens *v.* Childs, 58 Ala. 113.

[2] Scott *v.* Becher, 4 Price, 346; Re Chertsey Market, 6 Id. 279; Kerr on Injunctions, 172, 173.

[3] Kerr on Injunctions, Chap. IX.

[4] Smith *v.* Smith, 4 Jones Eq. 303; Thomas *v.* James, 32 Ala. 723.

[5] Hunter's Appeal, 4 Wright, 194; Lyon's Appeal, 11 P. F. Sm. 15; Thompson's Appeal, 107 Pa. St. 559; Hill *v.* Bowman, 35 Mich. 191; Patterson *v.* Fish, Id. 209.

[6] See Winch's Appeal, 11 P. F. Sm. 424; Davis *v.* Michenor, 106 Pa. St. 395.

[7] Cockell *v.* Bacon, 16 Beav. 158; Booth *v.* Booth, 2 Atk. 343; Drummond *v.* Pigou, 2 Myl. & K. 168: Kerr on Injunctions, 191.

tion to restrain by injunction members of a firm from doing acts inconsistent with the terms of the partnership agreement or with the duties of a partner.[1] Injunctions may be obtained without a dissolution: or for the purpose of carrying out a dissolution; or after dissolution for the purpose of protecting the rights of the respective parties. Thus during the continuance of a partnership a man may be restrained from a breach of the partnership articles, or from excluding his co-partner from the partnership business, or from entering into partnership with strangers. And perhaps the better opinion is that the court would interfere by injunction where a dissolution is not prayed, even in the case of partnerships determinable at will, although the point is somewhat doubtful.[2]

If a bill is filed for a dissolution of the partnership, an injunction may issue to restrain any act which may impede the winding up of the concern.

After dissolution, an agreement by a retiring partner not to carry on the business will be enforced by means of an injunction restraining the retiring partner according to the terms of his covenant. Other stipulations may also be enforced by injunction.[3]

427. Under the general jurisdiction of courts of equity to correct abuses of confidence, injunctions will be issued to restrain the disclosure of confidential communications, papers and secrets. That this jurisdiction is exercised upon the ground of a breach of confidence is shown by the case of trade secrets. Ordinarily a court will not restrain a person from divulging a trade secret; but if a person has gained possession of the secret by means of a confidential relation, he will be prevented by injunction from making use of or divulging the secret, because to do so would be a breach of faith.[4]

[1] See Stockdale *v.* Ullery, 1 Wright, (Pa.) 486.

[2] See upon the general subject Kerr on Injunctions, 164, 165; Lindley on Partnership, 1053; *post*, Chap. on Partnership Bills.

[3] Kerr on Injunctions, 166, 167.

[4] Newberry *v.* James, 2 Mer. 451; Williams *v.* Williams, 3 Id. 157; Yovatt *v.* Winyard, 1 J. & W. 394; Morison *v.* Moat, 9 Hare, 241; 21 L. J. Ch. 248; Peabody *v.* Norfolk, 98 Mass. 452; Kerr on Injunctions, 181.

SECTION II

INJUNCTIONS TO PROTECT LEGAL RIGHTS.

428. Classification of cases in which Injunctions issue to protect legal rights.
429. Waste.
430. Common-law remedies; their defects.
431. Reasons for remedy in equity.
432. Nature of Waste.
433. Parties who will be restrained from committing waste.
434. Equitable Waste.
435. Destructive Trespass; origin of jurisdiction in such cases.
436. Subdivision of the subject.
437. Public Companies; restrained from improperly taking land.
438. Nuisance.
439. Remedies at common law; their defects.
440. How far complainant's title at law must be established.
441. Different kinds of nuisance.
442. Coming to a nuisance.
443. Lateral support to soil; Purprestures; Public Companies.
444. Injunction in cases of Patent Right; Copyright; and Literary Property.
445. Inspection.
446. Injunction.
447. Account.
448. Patent Right.
449. Previous trial at law to establish right unnecessary.
450. Copyright.
451. Copyright.
452. Piracy, what it is.
453. Other requisites to an Injunction.
454. Literary Property; *Prince Albert* v. *Strange*.
455. Questions as to publication.
456. Trade-marks.
457. What are trade-marks.
458. Diligence; colorable imitations.
459. Alienation of negotiable securities.
460. Preservation of property pending litigation.
461. Breach of negative covenants.
462. *Lumley* v. *Wagner*.
463. Instances of covenants which have been restrained.
464. Negative quality imported into affirmative covenants.
465. Injunctions in cases of Corporations.

428. Having considered those cases in which a court of equity interferes by injunction for the purpose of protecting equitable rights, it will be convenient now to pass to the second general division of the subject, viz., that which embraces the instances in which a court of equity interposes for the purpose of protecting legal rights. It would be impossible, perhaps, in a general treatise like the present to notice minutely all of these instances. Most of them, however, will be found to be embraced in some one of the following heads—viz.: Waste, Trespass, Nuisance, Copyright, Literary Property, Patent Right, Trade-

Marks, Alienation of Property, Protection of Property pending Litigation, Negative Covenants and Corporations.

429. And, first, of Waste. It is settled law that a court of equity will, under proper circumstances, interfere by injunction for the purpose of restraining waste; and it will, therefore, in discussing this subject, be convenient to consider what waste is, what are its different kinds, what acts will constitute it, and for and against what parties equity will interfere.

Waste is defined to be a substantial injury to the inheritance done by one having a limited estate, either of freehold or for years, during the continuance of his estate. The essential characteristic of waste is that the party committing it is in rightful possession,[1] and that there is privity of title between the parties.[2] Thus, for example, if a tenant by the curtesy of England were to cut down the timber on the estate, suffer the mansion-house to go to decay, and tear down out-buildings, such conduct would be waste on his part, for which he would be responsible to the remainder-man, viz., the heir of the wife.

430. At common law the only parties liable for waste were the tenants of legal estates, *i. e.*, those estates which were created by act of law as distinguished from those created by act of party, and which were termed conventional estates. These parties who were thus liable for waste were tenants by the curtesy, in dower, and guardians; for, as the estates of these persons were created by law, it was thought proper that the law ought to interpose on behalf of the remainder-man, and hence these particular tenants were made liable for waste. Where, however, a limited estate was created by deed, the particular tenant was not at common law liable for waste, unless it was so expressly stipulated in the conveyance; because the law would not protect parties who did not take care to protect themselves. This harsh rule was, however, altered by the statutes of Marlbridge (52 Hen. III., c. 23), and Gloucester (6 Edw. I., c. 5), and the liability for waste extended to conventional tenants for life, and to tenants for years.

[1] For injunctions to restrain injuries to property when the party is in *hostile* possession, see *post*, § 460.

[2] A mortgagor who has parted with his equity of redemption cannot have an injunction to restrain waste by his vendor on account of his (the mortgagor's) liability on his bond. He has no *interest* in the land, and can therefore have no action concerning it.

The common-law remedy for waste, as extended by the statutes of Marlbridge and Gloucester, was by a writ of waste, in which the thing wasted was forfeited, and damages were recovered. The writ of waste has been abolished in England, and the only common-law remedy which the remainder-man now has is a special action on the case for damages.[1]

In many of the United States remedies for waste are given by statute; in some of them the place wasted being forfeited, and damages recovered; in others the remedy being simply an action for damages.[2]

431. It is obvious that both the common-law and statutory remedies were inefficient in this, viz., that they did not stop the injury that was going on, and that, however severe the remedy might be as against the defendant, it nevertheless afforded but inadequate redress to the plaintiff. Hence equity interposed by injunction to restrain the defendant from continuing to commit waste, and this remedy has been found so simple and so effective that it is now firmly established as a branch of chancery jurisdiction, and has to a great extent superseded the common-law action.[3]

432. Anything is waste which changes the character of the inheritance. Hence even acts which increase the value of the estate may amount to waste. Such waste is called meliorating waste.[4]

Waste is either voluntary or permissive. Voluntary waste consists in doing something which the owner of the limited estate has no authority to do, such as cutting timber, opening mines, and so forth. Permissive waste consists in the omission of acts which it is the duty of the particular tenant to perform, as if he permits buildings to go to decay by neglecting to repair

[1] Jefferson *v.* Bishop of Durham, 1 Bos. & Pull. 120; Williams on Real Prop. 24.

[2] See Washburn on Real Prop. 22, note.

[3] See Hill *v.* Bowie, 1 Bland, 593. Moreover, "chancery goes to greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury and depends on much latitude of discretion in the court." Kane *v.* Vanderburgh, 1 Johns. Ch. 4. See, further, as to this jurisdiction, Watson *v.* Hunter, 5 Johns. Ch. 169.

[4] Kerr on Injunctions, 239. See Doherty *v.* Allman, 3 App. Cas. 709, where the injunction was refused. The waste was meliorating waste.

them For permissive waste there is generally no remedy in equity; but an injunction may issue under special circumstances.[1]

It is impossible to give a catalogue of the acts which will amount to waste. It must, however, here be observed that many acts would be considered waste in England which are not so regarded in this country. Thus, in many parts of the United States, cutting timber by a tenant for life would be regarded as proper for the purpose of clearing the land;[2] whereas in England a tenant for life has no right to cut down trees, but can only enjoy their shade or fruit.[3]

It is waste to open new mines in land, although it is not waste to continue the working of mines already opened.[4] So it is waste to cultivate land in such a manner as to change its character;[5] to suffer a sea-wall to go to decay;[6] to tear down buildings, or permit them to become dilapidated;[7] or to remove fixtures.[8] To this last species of waste, however, it must be remembered that there are important exceptions in the cases of trade fixtures, and ornamental fixtures. Trade fixtures may be removed, if taken away before the expiration of the term; and so also may fixtures for ornament in some cases, although the rule as to this last class of fixtures is much more strict than as to the former.[9]

The existence of a covenant to repair does not preclude a court of equity from restraining waste by injunction.[10]

[1] Kerr on Injunctions, 252; Hill on Trustees, 590 (4th Am. ed.); Powys *v.* Blagrave, Kay, 495; Cannon *v.* Barry, 59 Miss. 289.

[2] Crawley *v.* Timberlake, 2 Ired. Eq. 460; Alexander *v.* Fisher, 7 Alab. 514; Gardiner *v.* Dering, 1 Paige, Ch. 573; McCullough *v.* Irvine, 1 Harris, (Pa.) 438; Lynn's Appeal, 7 Casey, 44; Morehouse *v.* Cotheal, 2 Zab. 521; Keeler *v.* Eastman, 11 Verm. 293; Drown *v.* Smith, 52 Maine, 141; Williams on Real Prop. 23; Hill on Trustees, 590 (4th Am. ed.). But the tenant for life must not cut down more timber than is necessary for the enjoyment of his estate; Johnson *v.* Johnson, 2 Hill Ch. 277; Livingston *v.* Reynolds, 26 Wend. 115; Smith *v.* Poyas, 2 Dessaus. 65.

[3] He is, however, entitled to reasonable estovers for necessary repairs, agricultural implements, and firewood.

[4] Co. Litt. 54 b.; Saunders' Case, 5 Co. Rep. 12 *a.*; Cowley *v.* Wellesley, L. R., 1 Eq. 656; Clegg *v.* Rowland, L. R., 2 Eq. 160.

[5] Co. Litt. 53 *b.*; Kerr on Injunctions, 249.

[6] Co. Litt. 53 *b.*

[7] Co. Litt. 53 *b.* See Douglass *v.* Wiggins, 1 Johns. Ch. 435.

[8] Kerr on Injunctions, 252.

[9] Elwes *v.* Mawe, 2 Smith's Lead. Cas. 177, and notes.

[10] Mayor of London *v.* Hedger, 18 Ves. 356.

433. An injunction to restrain waste is granted in other cases besides those of particular tenants and remainder-men. Thus, while the court will not ordinarily interfere to restrain joint-tenants, tenants in common, and co-parceners, it, nevertheless, will do so if the wrongdoer is insolvent, or is incapable of paying the excess of the value beyond his own share, or if the waste amounts to destructive waste or spoilation, or a partition suit has been instituted.[1]

So a mortgagee in possession may be restrained from committing waste if the security is sufficient;[2] but if the security is insufficient he is entitled to make the most of the property.[3] A mortgagor in possession is considered the owner of the property, and he may exercise all the rights of ownership. But if the security is insufficient, an injunction may go against a mortgagor.[4]

An action of waste would not lie at law by a remainder-man against the tenant for life, if there was a *mesne* remainder-man. As, for example, if there was a tenant for life, with remainder over to another for life, remainder over in fee; in such a case the last remainder-man could not maintain an action of waste against the first tenant for life, because as the effect of the action would be to forfeit the land for the benefit of the ultimate remainder-man, such a result would be extremely unjust as against the *mesne* tenant for life. The only remedy therefore which the remainder-man in fee would have, would be an action of trover for the trees cut down. But in equity, the ultimate remainder-man was allowed to maintain a bill for an injunction.[5]

Injunctions to restrain injuries to property are sometimes

[1] Smallman *v.* Onions, 3 Bro. C. C. 621; Twort *v.* Twort, 16 Ves. 128; Hole *v.* Thomas, 7 Ves. 589; Hawley *v.* Clowes, 2 Johns. Ch. 122. A vendee under articles may restrain the vendor from committing waste; Smith & Fleck's Appeal, 19 P. F. Sm. 474.

[2] Farrant *v.* Lovel, 3 Atk. 723; Triplett *v.* Parmalee, 16 Neb. 649.

[3] Millett *v.* Davey, 31 Beav. 470.

[4] Kerr on Injunctions, 262; Brady *v.* Waldron, 2 Johns. Ch. 148; Cooper *v.* Davis, 15 Conn. 556; Maryland *v.* Northern R. R. Co., 18 Maryl. 193; Robinson *v.* Russell, 24 Cal. 467; Ensign *v.* Colburn, 11 Paige, 503; Murdock's Case, 2 Bland, 461; Salmon *v.* Clagett, 3 Id. 125; Nelson *v.* Pinegar, 30 Ill. 473; Parsons *v.* Hughes, 12 Maryl. 1; High on Injunctions, § 445 *et seq.*

[5] See Garth *v.* Sir John Hind Cotton, 1 Ves., Sr. 546; 1 Lead. Cas. Eq. 697 (4th Am. ed.).

granted against parties claiming under a hostile title; but these are not, properly speaking, injunctions to restrain waste, but fall rather under the jurisdiction to preserve property pending litigation, and will be considered under that head.

434. Besides the ordinary waste there is also another kind of the same species of injury to real property which is known by the name of equitable waste.

Waste which a court of equity will restrain as an unconscientious exercise of legal power is called equitable waste.

Equitable waste arises where a particular estate is granted without impeachment of waste, but the particular tenant exercises his power in an unconscientious manner. Thus, if a tenant for life wantonly destroys trees planted or left standing around the mansion house for ornament, such destruction will be regarded in equity as waste, although the life estate was made without impeachment of waste.[1] So also the cutting of saplings or young trees, not fit for the purpose of timber, falls under the head of equitable waste.[2]

The leading authorities upon the subject of equitable waste in England are Vane *v.* Lord Barnard,[3] and Garth *v.* Sir John Hind Cotton.[4] The former was a case of outrageous destruction; for Lord Barnard, who was tenant for life, without impeachment of waste, of Raby Castle, had stripped the castle of the lead, iron, glass, etc., and was proceeding to pull it down, when he was stopped by an injunction.

But the court will not interfere if the matters complained of are of a trivial nature, for, as Lord Hardwicke observed in speaking of Barnard *v.* Vane, if the clause without impeachment of waste could be made use of to permit a son to call his father into a court of equity for every alteration he might make in pulling up the floor of the house, it would have been better for the public that Raby Castle should have been pulled down than that such a precedent should have been set.[5] The ingredient of malice does not appear to be necessary to constitute equitable waste.

[1] Micklethwait *v.* Micklethwait, 1 De G. & J. 504.

[2] Hole *v.* Thomas, 7 Ves. 589.

[3] Prec. Ch. 454; 1 Salk. 161; 2 Vern. 738.

[4] 3 Atk. 751; 1 Lead. Cas. Eq. 697 (4th Eng. ed.). See Baker *v.* Sebright, L. R., 13 Ch. D. 179.

[5] Peirs *v.* Peirs, 1 Ves., Sr. 521.

Such waste may be committed although no bad motive may exist.[1]

435. The next ground for an injunction which requires consideration is Trespass.

The jurisdiction of the court of chancery to restrain destructive trespass is of comparatively modern origin. The earliest case is that of Flamang, decided by Lord Thurlow, and mentioned by Lord Chancellor Eldon in Hanson *v.* Gardiner.[2] "I have a note," said Lord Eldon, "of a remarkable case in which the name of one of the parties was Flamang. There was a demise of a close A. to a tenant for life, the lessor being landlord of an adjoining close B. The tenant dug a mine in the former close. That was a waste from the privity. But when we asked an injunction against his digging in the other close, though a continuation of his working in the former close, Lord Thurlow hesitated much, but did at last grant the injunction, first, from the irreparable ruin of the property as a mine; secondly, as it was a species of trade; and thirdly, upon the principle of this court enjoining in matters of trespass, where irreparable damage is the consequence."

The jurisdiction of a court of equity to interfere upon the last of the three grounds mentioned by Lord Thurlow, is now well established, and, perhaps, more so in this country than in England.[3]

The frequency of the acts of trespass constitute another ground for the jurisdiction. The common-law action for damages furnishes an adequate redress for a single trespass, or even for several, where there are no circumstances to indicate that

[1] Hawley *v.* Clowes, 2 Johns. Ch. 122.

[2] 7 Vesey, 305. See, also, Stevens *v.* Beekman, 1 Johns. Ch. 317; Troy & Boston Rd. *v.* Boston, &c., Rd., 86 N.Y. 107.

[3] See Merced *v.* Fremont, 7 Cal. 317; Anderson *v.* Harvey, 10 Grat. 386; Hart *v.* Mayor of Albany, 3 Paige, 213; 9 Wend. 571; De Veney *v.* Gallagher, 5 C. E. Green, 33; London, &c., Rd. *v.* Lancashire, &c., Rd., L. R., 4 Eq. 174; Ryan *v.* Brown, 18 Mich. 196; Musselman *v.* Marquis, 1 Bush, 463; Henry *v.* Koch, 22 Am. L. Reg. 398 (Ky. Ct. of App.); Echelkamp *v.* Schrader, 45 Missouri, 705; Phillips *v.* Bordman, 4 Allen, 147; Wilcox *v.* Wheeler, 47 N. H. 488; Livingston *v.* Livingston, 6 Johns. Ch. 497; Watson *v.* Sutherland, 5 Wall. 74 (stated *ante*, p. 57); Mayor of Baltimore *v.* Appold, 42 Md. 442; Ford *v.* Burleigh, 60 N. H. 278; Smith *v.* Gardner, 12 Oregon, 221; Story's Eq. Jur., § 928; High on Injunc., Ch. X.

the unlawful acts are to be repeated continuously; but where these acts of trespass are constantly recurring, and threaten to continue, it is settled that they may be redressed in equity by injunction.[1]

The cases in which the courts have interfered have been divided into two general classes; first, where the party seeking relief is not in possession; and, second, where he is in possession.[2] The first class of cases will more properly be considered under the jurisdiction of the court to preserve property pending litigation, because the injury inflicted upon a person who has a title to property, but who is not in possession of the same, cannot strictly be considered as a trespass. But the second class of cases, that, namely, which embraces the instances wherein a party in possession is injured by acts of trespass, falls strictly within the equitable remedy now under consideration. Thus, in the case before Lord Thurlow, just cited, the injury which was the subject of the injunction, was inflicted against a party in possession of close B.

436. Acts of destructive trespass may be again subdivided into two classes: first; those which are committed under color of title; and, secondly, those which are committed by a party who is avowedly a stranger.[3] In both of these cases, in order to invoke the equitable remedy by injunction, the injury must be of such a nature as not to be susceptible of adequate pecuniary compensation in damages. Equity will not interfere to restrain a trespasser simply because he is a trespasser.[4] The injury complained of must be ruinous to the property in the manner in which it has been enjoyed, and such as permanently

[1] Stewart's App., 6 P. F. Sm. 422; Scheetz's App., 11 Casey, 88; Com. *v.* Pitts. & Connellsville Rd., 12 Harris, 159; Sterling's App., 111 Pa. St. 41; Owens *v.* Crossett, 105 Ill. 354; Poughkeepsie Gas Co. *v.* Citizens' Gas Co., 89 N. Y. 493; Ford *v.* Burleigh, 60 N. H. 278; Story's Eq. Jur., §§ 925–6–7.

[2] Lowndes *v.* Bettle, 33 L. J. Ch. 451.

[3] Id.

[4] Stevens *v.* Beekman, 1 Johns. Ch. 318; Mulvany *v.* Kennedy, 2 Casey, 44; Clark's App., 12 P. F. Sm. 447; Minnig's App., 1 Norris, (Pa.) 377; Jerome *v.* Ross, 7 Johns. Ch. 330; Weigel *v.* Walsh, 45 Mo. 560; Bethune *v.* Wilkins, 8 Geo. 118; Vanwinkle *v.* Curtis, 2 Green Ch. 422; Ballentine *v.* Harrison, 37 N. J. Eq. 560; Shipley *v.* Ritter, 7 Md. 408; Coker *v.* Simpson, 7 Cal. 340; West *v.* Walker, 2 Green Ch. 279; Gause *v.* Perkins, 3 Jon. Eq. 177.

to impair its future enjoyment.[1] The application of the rules upon this subject must depend very much upon the circumstances of the particular case. The insolvency of the trespasser, for example, will afford a ground for interference, since his inability to respond in damages renders the remedy at law ineffectual.[2]

In the case of Cowper *v.* Baker,[3] the defendant was restrained from taking certain argillaceous stones, necessary to the manufacture of a patent cement, under the sea. Lord Eldon considered the damages there done to the plaintiff to be irreparable, not because it was a destruction *simpliciter*, but because it was a taking away of the substance of the inheritance. In like manner an injunction has been issued to restrain the working of oil wells, the result of which would be a permanent and continuing injury to the property.[4] Upon the same principle, trustees of a corporation may enjoin pretended trustees from intermeddling with the corporate property where the trespass goes to the destruction of the property in the character in which it was enjoyed.[5] The general principles which govern cases of this kind were well laid down by Vice-Chancellor Kindersly in the case of Lowndes *v.* Bettle.[6] "Where, therefore," says that learned judge, "the plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under color of right, the tendency of the court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law, though, where the acts tend to the destruction of the estate, the court will grant it. But where the party in possession seeks to restrain one who claims by adverse title, then the tendency will be to grant the

[1] Echelkamp *v.* Schrader, 45 Mo. 505; Jerome *v.* Ross, 7 Johns. Ch. 315; Mayor of Frederick *v.* Groshon, 30 Md. 436.

[2] Musselman *v.* Marquis, 1 Bush, 463; Hicks *v.* Compton, 18 Cal. 206; Britton *v.* Hill, 12 C. E. Green, 389; Piper *v.* Piper, 38 N. J. Eq. 81; Long *v.* Kasebeer, 28 Kan. 262. See Gause *v.* Perkins, 3 Jon. Eq. 177.

[3] 17 Ves. 128. See, also, Merced *v.* Fremont, 7 Cal. 317; Anderson *v.* Harvey, 10 Grat. 386; U. S. *v.* Gear, 3 How. 120; Davis *v.* Reed, 14 Md. 152.

[4] Allison & Evans' App., 27 P. F. Sm. 221. See, also, Scully *v.* Rose, 61 Md. 408.

[5] Trustees *v.* Hoessli, 13 Wis. 348. The decision in this case was put upon the ground of destructive trespass, but it would seem that it might have been sustained under the general jurisdiction of chancery to protect charities and enforce religious trusts.

[6] 33 L. J. Ch. 451.

injunction, at least where the acts done either did or might tend to the destruction of the estate."

437. Under the head of injunction to restrain destructive trespass may, perhaps, fall many of the cases in which public companies are restrained from an improper exercise of their statutory rights to take private property for their own use; although some of the cases of this description may more properly be classed under "Injunctions against Corporations."

In cases of trespass by corporations, courts of equity will act with greater promptness, and will apply more stringent rules than in the case of trespass by private individuals. There is an equity to keep corporations within the strict limits of their statutory powers, and prevent them from deviating in the smallest degree from the terms prescribed by the statute which gives them authority. A man has a right to say that a corporation shall not enter upon his land, except upon the terms, and under the regulations prescribed by statute; and he has a further right to invoke the aid of a court of equity to protect him by its writ of injunction.[1]

438. Another injury to real property, to redress which it has been found necessary to resort to the equitable remedy of injunction, is Nuisance; and the authority of the court is, in modern times, probably as frequently applied, and as beneficially exercised, in this as in any other branch of equity jurisprudence.

A nuisance is an act, unaccompanied by an act of trespass, which causes a substantial injury to the corporeal or incorporeal hereditaments of other persons. Where a man wrongfully disturbs another in the exclusive enjoyment of property, he commits an act of trespass; but where the infringement of the right is the consequence of an act which is not, in itself, an invasion of property, the cause from which an injury flows is termed a nuisance.[2]

[1] See Kemp *v.* London & Br. Ry., 1 Railw. Cas. 495; Bell *v.* Hull & Selby Ry., Id. 635; Frewin *v.* Lewis, 4 Myl. & Cr. 249; Tinkler *v.* Metropolitan Board of Works, 2 De G. & J. 261; Jarden *v.* Phila., Wil. & Balt. Rd., 3 Whart. 502; Bonaparte *v.* Camden & Amboy Rd., Baldwin, 205; McIntyre *v.* Storey, 80 Ill. 127; Manchester, 25 Grat. 827; Wilkin *v.* City of St. Paul, 33 Minn. 181; Western Pa. Rd. Co.'s App., 104 Pa. St. 399; Kerr on Injunctions, 296.

[2] Kerr on Injunctions, 332.

Nuisances are either public or private. A private nuisance is an injury to the property of an individual. A public nuisance is an injury to all persons who come within the sphere of its operation.[1]

439. The remedy for public nuisance is by information by the attorney general. The attorney general may likewise proceed by bill in equity; and if an individual has also sustained special damage over and above the public injury, he also may proceed by bill.[2]

The remedies at common law for a private nuisance were, an action on the case to recover damages, the assize of nuisance, which lay originally only against the wrongdoer, but was subsequently extended as against the alienee, by the statute of Westminster the Second; and the writ *quod permittat prosternere*, which lay against the alienee as well as the wrongdoer, and was in the nature of a writ of right. These last two remedies fell out of use in England, and were finally abolished by statute 3 & 4 Wil. IV., c. 27; so that the only remedy now in use in the common-law courts is the action on the case for damages.

It is obvious that this remedy is very insufficient. If one man is carrying on a trade near another's house, which is injurious to the health of the latter, and destructive to his property, a recovery of damages is manifestly but a poor redress. Hence equity will interfere by injunction to restrain the continuance of the noxious trade, and thus effectually put a stop to the injury. This jurisdiction in cases of nuisance is of an ancient date, and has been traced back to the reign of Elizabeth,[3] since

[1] See Soltau *v.* De Held, 2 Sim. N. S. 142.

[2] Corning *v.* Lowerre, 6 Johnson Ch. 439; City of St. Louis *v.* Knapp, 6 Fed. Rep. 221; Soltau *v.* De Held, 9 Eng. L. & Eq. 104; Knox *v.* New York, 55 Barb. 404; Savannah, etc., R. R. *v.* Shiels, 33 Geo. 601; Ewell *v.* Greenwood, 26 Ia. 377; Black *v.* Phil. & Read. R. R., 8 P. F. Sm. 249; Whitfield *v.* Rogers, 26 Miss. 84; Bunnell's Appeal, 19 P. F. Sm. 62; Commissioners *v.* Long, 1 Pars. Eq. Cas. 143; Commonwealth *v.* Rush, 2 Harris, 186; City of Georgetown *v.* Alexandria Canal Co., 12 Peters, 98; Hillard on Injunctions, 336 (3d Am ed.).

[3] "The bill was to be relieved of a nuisance committed by the defendant to the plaintiff's mill, by erecting a new mill and turning or letting the watercourse from serving the plaintiff's mill; but for that the plaintiff, since the bill exhibited had brought an assize of nuisance at law. Therefore the cause is dismissed, if cause be not

which time it has been continuously exercised; and the modern doctrine may be stated in general terms to be that equity has concurrent jurisdiction with courts of law in all cases of private nuisance, the interference of chancery in any particular case being justified on the ground of restraining irreparable mischief, or of suppressing interminable litigation, or of preventing multiplicity of suits.[1]

In modern times (as has been already stated) the jurisdiction of courts of chancery in cases of nuisance has been very beneficially and very frequently exercised, and the whole doctrine of equity upon this subject has been most thoroughly and carefully considered both in England and in this country. Perhaps no better way of explaining the principles upon which courts of equity act in cases of this kind can be found than by stating briefly one or two of the leading authorities upon the subject, and the conclusions which have been reached therein.

In St. Helen's Smelting Company *v.* Tipping,[2] certain persons had purchased a portion of an estate for the purpose of erecting thereon works for smelting copper, and the plaintiff subsequently purchased another portion of the same estate with notice of the erection and operation of the smelting works. After this, the company defendants were organized for the purpose of carrying on the copper works on a larger scale; and the plaintiff, having discovered that injury had already been done to his trees, brought an action at common law for damages, and after obtaining a verdict and judgment (which was affirmed in the House of Lords), filed a bill in equity for an injunction, which was granted.

In this case (when in the House of Lords) the distinction was taken between nuisances which produce a material injury to property, and those things which are alleged to be nuisances simply on the ground that they are productive of personal inconvenience. In the latter class of cases a person has no right to complain of individual discomfort arising from business in the neighborhood, if that business is carried on in a fair and reason-

shown. Osburne, plaintiff, Barter and Goddins, defendants. Anno 26 Eliz." Choyce Cases in Chancery, p. 176. (Reprint of 1870). See Bitting's App., 105 Pa. St. 517.

[1] Carlisle *v.* Cooper, 6 C. E. Green, 576.

[2] 11 H. L. Cas. 642; L. R., 1 Ch. 66. See Penna. Lead Co.'s Appeal, 96 Pa. St. 116.

able way; but, on the other hand, this rule would not apply to circumstances the immediate result of which is a sensible injury to the value of property. And it was further said that while everything must be looked at from a reasonable point of view, and that the law does not regard trifling and small inconveniences, but only those which sensibly diminish the comfort, enjoyment or value of the property which is affected; yet the fact of injury having been found by a jury, their verdict would not be disturbed; and that, consequently, the plaintiff was entitled, in the chancery suit, to an injunction to protect his rights which had been thus ascertained at law.

On the other hand, when the alleged nuisance consists in something which produces purely personal annoyance without injury to the property, except as a subject of personal enjoyment, the question is emphatically one of degree. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable. Therefore, in Gaunt *v.* Fynney,[1] where trifling annoyance had been occasioned by the noise and vibration from a silk mill, which had been acquiesced in for some time, the court refused the injunction. Where, however, business which is carried on is physically offensive to the senses, and, therefore, by producing physical discomfort, renders houses in the neighborhood unfit for residences, it will be a nuisance; and not the less so because there may be persons whose habits of life have brought them to endure the same annoyance without discomfort.[2]

The same principles as those laid down in these cases have been generally recognised and applied in the courts throughout the United States,[3] and in other decisions in England.[4]

[1] L. R. Ch. 8. See McCaffrey's Appeal, 105 Pa. St. 253.

[2] Cleveland *v.* Citizens' Gas Light Co., 5 C. E. Green, 201.

[3] Rhodes *v.* Dunbar, 7 P. F. Sm. 274; Richard's Appeal, Id. 105; New Boston Coal & Mining Co. *v.* Pottsville Water Co., 4 P. F. Sm. 171; Cleveland *v.* Citizens' Gas Light Co., 5 C. E. Green, 201; Carlisle *v.* Cooper, 6 Id. 576; Ross *v.* Butler, 4 Id. 294; Webber *v.* Gage, 39 N. Hamp. 182; Farrell *v.* Cook, 16 Neb. 483; Parker *v.* Winnipiseogee Co., 2 Black, (U. S.) 545.

[4] Walter *v.* Selfe, 4 De G. & Sm. 315; Crump *v.* Lambert, L. R., 3 Eq. 409; Soltau *v.* De Held, 2 Sim. (N. S.) 133; Bostock *v.* North Stafford R. R. Co., 5 De G. & Sm. 584; Wood *v.* Sutcliffe, 2 Sim. (N. S.) 163; Hole *v.* Barlow, 4 C. B. (N. S.) 334; Crossley *v.* Light-

440. The right to an injunction to restrain a nuisance depends very often upon a preliminary question as to the plaintiff's legal right, that is to say, whether his legal right has been admitted or established. To illustrate: suppose a bill is filed to restrain a defendant from erecting a wall whereby the alleged ancient lights of the complainant would be darkened. Now, the question of nuisance or no nuisance in this case would obviously depend upon the ascertainment of a preliminary fact—viz., whether the complainant actually had a right to his windows as ancient lights, because, if he fails to show this, or fails to show that by some other means, *e. g.*, a grant of an easement, he has acquired the right to unobstructed windows, the act of the defendant is obviously no nuisance.[1]

Now, if the complainant's legal right is admitted, or if it be clearly established, then his right to an injunction is plain.[2] But if it is manifest that the complainant has no legal right, the injunction must be refused.

If the case falls between these two—that is to say, if the complainant's title is doubtful, the ordinary rule is not to interfere until his title has been established at law.[3] Where, however, the emergency is pressing, and the threatened damage would be irreparable, and the plaintiff makes out a fair *prima facie* title, even though that title may be disputed, in such a case a special injunction ought to issue, but at the same time, the complainant ought to take diligent steps to have his legal right tried and established.[4]

owler, L. R., 2 Ch. 478; Att. Gen. *v.* Bradford Canal, L. R., 2 Eq. 71; Robson *v.* Whittingham, L. R., 1 Ch. 442.

[1] Biddle *v.* Ash, 2 Ashmead, 211; Rhea *v.* Forsyth, 1 Wright, (Pa.) 507. See, also, Fernie *v.* Young, 16 Law Times Rep. (N. S.) 637; White *v.* Booth, 7 Verm. 131; Varney *v.* Pope, 60 Maine, 192; Coe *v.* The Winnepisiogee Co., 37 N. Hamp. 254; Eastman *v.* Amoskeag Co., 47 Id. 71; Mammoth Vein Coal Co.'s Appeal, 4 P. F. Sm. 181; Brown's Appeal, 12 Id. 17; Hart *v.* The Mayor of Albany, 3 Paige Ch. 213; Reid *v.* Gifford, 6 Johns. Ch. 19; Frizzle *v.* Patrick, 5 Jones Eq. 354; Caldwell *v.* Knott, 10 Yerg. 209; Arnold *v.* Klepper, 24 Missouri, 273; McCord *v.* Iker, 12 Ohio, 387; Zinc Co. *v.* Franklinite Co., 2 Beas. 322; Durant *v.* Williamson, 3 Halst. Ch. 547; Carlisle *v.* Cooper, 6 C. E. Green, 576; High on Injunctions, § 486.

[2] See Gas Co. *v.* Broadbent, 7 H. L. Cas. 600; Denton *v.* Leddell, 8 C. E. Green, 64.

[3] See authorities cited in note 1; Washburn's Appeal, 105 Pa. St. 480.

[4] See Holsman *v.* Boiling Spring Co., 1 McCart. 335; Duncan *v.* Hayes, 7 C.

The tendency of the modern decisions is certainly very much against the old rule which required the prior establishment of the legal right.

Again: a court of equity will not interfere if the damage is slight, and the nuisance is of a temporary character, so that damages at law would furnish an entire and adequate reparation.[1] The nuisance, moreover, must actually exist, or be imminent. A mere threat, or an act which may upon some contingency or at some remote time prove a nuisance, will not warrant the interference of the court.[2] And the injury must not be contingent merely; and apprehension on the part of the complainant of a possible or speculative harm will not be enough.[3] But where it is shown that the action of the defendant, if continued, will ultimately become a nuisance, the mere fact that the annoyance is scarcely at present appreciable will not prevent the court from interfering. Thus, where the pollution of a stream is very slight and only at times perceptible, but it is shown that the pollution is increasing, and will, in process of time, become an absolute nuisance, it has been held that the act which produces this result will be enjoined.[4] A bill to enjoin a nuisance is usually brought by the occupier, or by the lessee in possession; but the owner may sue on the ground of injury to his property, either alone or conjointly with the occupier.[5]

441. The different kinds of nuisances are of course numerous and varied; and whether or not a court of equity will interfere will depend very much upon the circumstances of the particular case.

It is a nuisance, as has been already stated, to obstruct the light and air to which the owner of a building is legally

E. Green, 25; Carlisle *v.* Cooper, 6 Id. 576; McCallum *v.* Germantown Water Co., 4 P. F. Sm. 40; Gardner *v.* Newburgh, 2 Johns. Ch. 162; Soltau *v.* De Held, 2 Sim. N. S. 133; Kerr on Injunctions, 197, 336, 340.

[1] Webber *v.* Gage, 39 N. Hamp. 186; Bemis *v.* Upham, 13 Pick. 169; Croton Turnpike *v.* Ryder, 1 Johns. Ch. 611; Richards's Appeal, 7 P. F. Sm. 105; Wingfield *v.* Crenshaw, 4 Hen. & Mun. 474; Bradsher *v.* Lea, 3 Ired. Eq. 301; Thebaut *v.* Canova, 11 Florida 143; Health Dept. *v.* Purdon, 99 N. Y. 241.

[2] Kerr on Injunctions, 337, 338.

[3] Rhodes *v.* Dunbar, 7 P. F. Sm. 274; Butler *v.* Rogers, 1 Stockt. 487; Mohawk Bridge Co. *v.* Utica & Schenectady Rd., 6 Paige Ch. 554.

[4] Goldsmid *v.* Tunbridge Wells Improvement Co., 12 Jur. N. S. 308; McCallum *v.* Germantown Water Co., 4 P. F. Sm. 52. Story's Eq. § 929 d.

[5] Kerr on Injunctions, 336.

entitled ;[1] but it is not a nuisance, simply to shut out a pleasant prospect, or to erect disagreeable objects in view, or to open windows whereby a man's private grounds may be overlooked.[2]

The enjoyment of pure and wholesome air is a right to which the occupiers of land are entitled as of common right; and any act which pollutes and corrupts the air so as to produce a real and sensible damage constitutes a nuisance.[3] It would be impossible in a work like the present to give a catalogue of all the acts which have been held to be nuisances under this rule. A few of them are given, by way of illustration, in the note.[4]

Noisy manufactories may be nuisances, especially when accompanied by a vibration ;[5] and mere noise, from whatever cause, will, on a proper case being made out, be a sufficient ground for an injunction.[6]

But the jurisdiction in all these cases should be exercised with great caution. Lord Chancellor Selbourne, in Gaunt *v.* Fynney,[7]

[1] Johnson *v.* Wyatt, 2 De G., J. & S. 18, 26 ; Robson *v.* Whittingham, L. R., 1 Ch. 442 ; Staight *v.* Burn, 5 Id. 163 ; Aynsley *v.* Glover, 10 Id. 283 ; Sutcliff *v.* Isaacs, 1 Pars. Eq. 494 ; Biddle *v.* Ash, 2 Ash. 211. The English rule upon the subject of ancient lights has not been generally followed in this country ; King *v.* Miller, 4 Halst. Ch. 559 ; Chevry *v.* Stein, 11 Maryl. 1 ; High on Injunctions, § 553.

[2] Aldred's Case, 9 Coke, 58 *a* ; Webb *v.* Bird, 10 C. B. (N. S.) 276 ; Att. Gen. *v.* Doughty, 2 Ves. Sr. 453 ; Jones *v.* Tapling, 12 C. B. (N. S.) 842, per Blackburn, J. ; Vollmer's Appeal, 11 P. F. Sm. 118.

[3] Kerr on Injunctions, 360.

[4] Brickburning, Walter *v.* Selfe, 4 De G. & S. 325 ; Campbell *v.* Seaman, 63 N. Y. 568 ; (though see Huckenstein's App., 20 P. F. Sm. 102) ; offensive smoke, Crump *v.* Lambert, L. R., 3 Eq. 409 ; offensive gases, Tipping *v.* St. Helen's Smelt. Co., L. R., 1 Ch. 66 ; a soap-boilery, Regina *v.* Pierce, Show. 327 ; a public urinal, Sellors *v.* Board of Health, 14 Q. B. 928 ; a slaughter-house, Regina *v.* Cross, 2 Car. & P. 484 ; Bishop *v.* Banks, 33 Conn. 118 ; Woodyear *v.* Schaffer, 57 Md. 1 ; Pruner *v.* Pendleton, 75 Va. 516 ; see Sellers *v.* Penna. Rd., 1 W. N. C. 295 ; a powder magazine, Wier's App., 24 P. F. Sm. 230 ; a hog-sty, Aldred's Case, 9 Co. Rep. 58 *b*. See Rhodes *v.* Dunbar, 7 P. F. Sm. 275 (per Read, J.).

[5] Demarest *v.* Hardham, 34 N. J. Eq. 469.

[6] White *v.* Cohen, 1 Drewry, 313 ; Soltau *v.* DeHeld, 2 Sim. N. S. 133 ; Crump *v.* Lambert, L. R., 3 Eq. 409 ; Harrison *v.* St. Mark's Church, 3 W. N. Cas. 389 ; affirmed on appeal, 34 Leg. Int. 222 ; Butterfield *v.* Klaber, Id. 87 ; Leeté *v.* Pilgrim Cong. Soc., 14 Mo. App. 590 ; Bradley *v.* Gill, Lutwyche, 29 ; Ball *v.* Ray, L. R., 8 Ch. 467 ; Broder *v.* Saillard, L. R., 2 Ch. D. 692 ; Bishop *v.* Banks, 33 Conn. 118 ; Roskell *v.* Whitworth, 19 Week. Rep. 804 ; Scott *v.* Firth, 10 Law Times (N. S.), 240 ; Fish *v.* Dodge, 4 Denio, 311 ; Dennis *v.* Eckhardt, 3 Grant's Cas. 390 ; Whitaker *v.* Hudson, 65 Ga. 43 ; Inchbald *v.* Barrington, L. R., 4 Ch. 388 ; Davis *v.* Sawyer, 133 Mass. 289 ; 22 Am. Law Reg. 636 ; Wood on Nuisances, chap. xvi.

[7] L. R., 8 Ch. 11. See, also, the re-

quoted with approval the old Scotch maxim which forbids a man to use his own rights "*in emulationem vicini;*" and said that neighbors everywhere (and certainly in manufacturing towns) ought not to be extreme or unreasonable either in the exercise of their own rights or in the restriction of the rights of each other. A dangerous business may be a nuisance;[1] but, this may depend upon whether the locality is populous or otherwise.[2]

442. It was formerly thought that if a man erected a dwelling-house in the immediate neighborhood of a factory where an offensive, or noisy, or dangerous trade was carried on, he was not entitled to his injunction, because it was his own fault to move into the proximity of the objectionable trade.[3] But this doctrine of "coming to nuisance" (as it was termed) is now exploded, and the most recent authorities hold that the injunction will not be refused on that ground.[4]

443. Acts whereby the right of vertical and lateral support to one's land, by the subjacent and adjacent soil, is interfered with; whereby rights in the enjoyment of water are affected; or whereby rights of way are impeded, are all nuisances, and will be enjoined on a proper case being made out.[5]

Equity entertains jurisdiction by injunction in cases of purpresture. A purpresture originally signified a close or inclosure; that is, where one encroaches, or makes that several to himself, which ought to be common to many.[6] In its common acceptance it afterwards came to mean an encroachment upon the king, either upon part of his demesne lands, or upon rights and easements held by him for the public, such as upon highways, public rivers, forts, streets, squares, bridges, quays and other public accommodations; and the tendency now is, perhaps, to restrict its signification to an invasion or an encroach-

marks of Lord Westbury in Tipping *v.* St. Helen's Smelt. Co., 11 H. L. Cas. 649; Huckenstine's App., 20 P. F. Sm. 107; Sparhawk *v.* Union Pass. Rd., 4 P. F. Sm. 401.

[1] Crowder *v.* Tinkler, 19 Ves. 617; Hepburn *v.* Lordan, 2 Hem. & M. 345; Wier's Appeal, 24 P. F. Sm. 230.

[2] Dilworth's Appeal, 91 Pa. St. 247.

[3] See 2 Black. Com. 402; Kerr on Injunctions, 363.

[4] Elliotson *v.* Feetham, 2 Bing. N. C. 134; Tipping *v.* St. Helen's Smelt. Co., L. R., 1 Ch. 66; 11 H. L. Cas. 649. See, also, Cleveland *v.* Citizens' Gas Light Co., 5 C. E. Green, 201; and Campbell *v.* Seaman, 63 N. Y. 568.

[5] Kerr on Injunctions, 366, *et seq.*; High on Injunctions, 279, *et seq.*

[6] Co. Litt. 2d Institute, 38, 272; Story's Eq. Jurisp., § 921.

ment on the soil of the seashore, or bed of an estuary or navigable tidal river between high and low-water mark while the same remains in the crown. To constitute a public nuisance it should be shown that the purpresture is productive of damage to some public right. If the act complained of be a mere purpresture without being at the same time a nuisance, the court will usually direct an inquiry to be made whether it is more beneficial to the crown to abate the purpresture, or to suffer the erection to remain and be arrested. But if the purpresture be also a public nuisance, this cannot be done, for the Crown cannot sanction a public nuisance.[1]

A bill in equity to abate a public nuisance filed by one who has sustained special damage, has succeeded to the former mode in England of an information in chancery, prosecuted on behalf of the crown, to abate or enjoin the nuisance, as a preventive remedy, and the jurisdiction of courts of chancery in such cases is well established in this country.[2] Unless the party who files the bill can show that he has sustained, and is still sustaining, individual damage, his bill cannot be maintained.[3] If the injury suffered is one which has been sustained in common with other citizens, and the damage is not special or peculiar, the injunction will be dissolved.[4]

Companies having the power to take land and construct public works are not amenable to the jurisdiction of a court of equity if they keep within the line of their powers, and proceed under their authority with due skill and care. But if they exceed their authority, or if they construct their works in such a negligent and unskilful manner as to cause injury to others the court will interfere.[5]

Where public rights under the laws of the United States are

[1] Kerr on Injunctions, 395, 396.

[2] State of Pennsylvania *v.* The Wheeling Bridge Co., 13 How. 564.

[3] Miss. & Mo. Rd. *v.* Ward, 2 Black, (U. S.) 492; Hinchman *v.* Paterson Horse Rd., 2 C. E. Green, 75; Att. Gen. *v.* Utica Ins. Co., 2 Johns. Ch. 379.

[4] Allen *v.* Board of Freeholders, 2 Beas. 68. See upon the general subject Bigelow *v.* Hartford Bridge Co., 14 Conn. 565; Corning *v.* Lowerre, 6 Johns. Ch. 439; Hartshorn *v.* South Reading, 3 Allen, 501; Del. & Md. Rd. *v.* Stump, 8 Gill & J. 479; Buck Mt. Co. *v.* Lehigh Co., 14 Wright, (Pa.) 91; Bunnell's App., 19 P. F. Sm. 59; City of Columbus *v.* Jaques, 30 Ga. 506; Lukers *v.* Sturtevant, 10 Oregon, 170; High on Injunctions, § 822 *et seq.*

[5] Kerr on Injunctions, 342; *post*, Injunctions in cases of Corporations.

infringed, the circumstance that the act was done by virtue of authority from a State legislature, is no justification.[1]

444. The jurisdiction of equity upon the subjects of patent-right, copyright, literary property, and trade-marks, depends upon the fact that the remedy at common law is entirely inadequate. Thus an infringement of a patent cannot be redressed by damages at law, for two reasons; in the first place, it may be very difficult, if not altogether impossible, to ascertain the exact amount of injury which the unlawful use or manufacture of the patented article may have occasioned; and in the second place, every fresh violation of the plaintiff's right would call for a new action, and thus the injured party would be involved in constantly renewed and, perhaps, interminable litigation. For these reasons the equitable remedy by injunction has been employed, in order that the right of the plaintiff, if it really exists, may be settled at once and for ever, and the wrongful acts of the defendant may be permanently stopped.

The equitable remedy possesses an advantage over the common-law action in obtaining three results which cannot be reached by a suit for damages, viz., (1) Inspection; (2) Injunction; and (3) Account.

445. The first of these advantages is most frequently shown in cases of bills to restrain violations of patent-rights. It sometimes happens that a patentee is unable to ascertain how, or in what particulars, the machinery used by his rival is a violation of his right. In such cases a court of equity will, upon a fair *prima facie* case being made out, order the defendant to permit an inspection to be made of his premises and machinery by proper persons named on behalf of the plaintiff.[2]

446. In the second place, the equitable remedy by special injunction is efficacious in restraining at once the violation of the complainant's rights, if a proper case for such relief is made out on preliminary application; while, after the right of the complainant and the fact of infringement have been duly established, the perpetual injunction for ever prevents infringements in the future.

447. Thirdly; for the purpose of affording complete relief equity will order an account by the defendant of all the profits

[1] State of Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518.

[2] Kerr on Injunctions, 433.

which he has made, and will compel him to make discovery for the purpose of ascertaining such profits. In taking the account the court is ordinarily confined to the profits actually made. Thus the court cannot estimate how many copies of an expensive book have been excluded from the market by the unauthorized publication of a cheaper copy.[1] In cases of patents, however, the courts of equity in England are authorized by statute to inquire into the question of damages in addition to, or in substitution for an account.[2] And in cases of infringement of rights of literary property—*e. g.*, a dramatic composition—an inquiry has been directed to ascertain how much a license to represent the play would have been worth.[3]

In coming to obtain relief in equity the complainant must exercise due diligence. If he has been guilty of great delay, or of acquiescence in the infringement of his rights, relief will be refused.

448. Having noticed the general principles applicable to the cases now under consideration, it will be convenient to say a few words about each of these cases in detail.

And, first, as to patent-rights. A patent is a grant, by government, to the author of a new and useful invention, of the exclusive right for a term of years of practising that invention. The right is dependent upon statute; and, in the United States, rests upon acts of Congress, the subject being one which, under the Constitution, falls within the sphere of federal jurisdiction. The right to interfere by injunction, therefore, in this class of cases, is exercised only by the courts of the United States, the State courts having no jurisdiction.[4]

What constitutes the proper subject-matter of a patent; what parties are entitled to it; what steps are necessary to obtain it; and what acts would amount to an infringement thereof, are, of course, questions which do not fall within the scope of this work. They will be found learnedly discussed in separate

[1] Colburn *v.* Simms, 2 Hare, 543; Kerr on Injunctions, 472.

[2] Stat. 21 & 22 Vic., c. 27.

[3] Keene *v.* Wheatley, 9 Am. Law Reg. 92.

[4] Parkhurst *v.* Kinsman, 2 Halst. Ch. 600; High on Injunctions, § 602. State courts, however, can enforce a contract or a trust of which a patent is the subject, even though the validity of the patent may come incidentally in question. See Slemmer's Appeal, 8 P. F. Sm. 155; Curtis on Patents, 496.

treatises.[1] It will be sufficient, in addition to the general principles already stated, to notice a few rules by which the application of the equitable remedy of injunction to this subject is regulated.

449. In England, it had once been the opinion that a court of equity would not interfere to protect a patent right by injunction, until the right had been established at law;[2] but this doctrine was denied by Lord Eldon, and it is now settled that the court will interfere in all cases where there is a clear color of title, and assertion of right has not been disputed.[3] The federal courts have followed the doctrine of Lord Eldon, and have been disposed to extend its application with considerable liberality; so that it is now by no means necessary, as a general rule, that there should be a trial at law whereby the validity of the complainant's title may be established before an injunction goes out, even (it would seem) in the case of a final injunction.[4] The question, however, must be one as to the decision of which the court is to exercise a sound discretion,[5] and it has been said that this discretion should be exercised only "when the complainant's title and the defendant's infringement are admitted, or are so clear and palpable that the court can entertain no doubt upon the subject."[6] If the patent be an old one, that is a strong circumstance in favor of letting the injunction go out. If it be but of yesterday, the remedy is to be applied with more caution, and stronger *prima facie* proof of title and infringement will be required. Many other circumstances may exist whereon the propriety of issuing the injunction may depend. Thus, the defendant's *bona fides* in acting under letters patent of his own; the hardship of the particular case; the defendant's solvency; and the diligence of the complainant, should all be considered.[7]

[1] See Curtis on Patents.

[2] Millar *v.* Taylor, 4 Burr. 2303.

[3] Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 689.

[4] Sickles *v* Gloucester Manufacturing Co., 1 Fisher's Patent Cases, 222; Sanders *v.* Logan, 2 Id. 167; Potter *v.* Muller, Id. 465; Shelly *v.* Brannan, 4 Id. 198.

[5] Brooks *v.* Norcross, 2 Fisher's Patent Cases, 661; Potter *v.* Fuller, Id. 251; Motte *v.* Bennett, Id. 642. See this last case, also, for a discussion of the general subject of equity jurisdiction in cases of Patents. See High on Injunctions, § 604.

[6] Barley Wringing Machine Co. *v.* Adams, Reporter, Vol. v., p. 102 (U. S. C. C., W. D. Pa.); Parker *v.* Sears, 1 Fisher's Patent Cases, 96.

[7] High on Injunctions, § 616 *et seq.*

In this country, contrary to the English rule, an account may be granted although the injunction is refused.[1] Thus, if the patent has expired between the time of filing the bill and the hearing, an account may be directed, though no injunction will be allowed against the future use of the article.[2]

450. Copyright, according to the legal acceptation of the term, is the exclusive right or monopoly of multiplying a work of literature or art after it has been published; the right, in other words, of preventing all others from copying, by printing or otherwise, a work of literature or art which the author has published.[3]

The question whether there was or was not a copyright at common law after publication, was for a long time involved in doubt.[4] The prevailing opinion at first was that such a right did exist, and this right was recognised in many decisions, and by many judges, among them by no less eminent jurists than Lords Mansfield and Hardwicke, the latter of whom, in 1739, restrained by injunction the publication of Milton's Paradise Lost, although the title of the plaintiff was derived from an assignment by the author made in 1667. But this did not long continue to be the law. The House of Lords, in Donaldson *v.* Beckett, in 1774, distinctly overruled the previous decisions; and it must now be considered settled that there is no copyright at common law after publication.[5]

451. Copyright in this country depends upon the Acts of Congress; and the remedies for its infringement are exclusively within the United States courts.[6] In order to invoke the equitable remedy by injunction, it is not, as a general rule, necessary in this country to establish the right at law in the first instance. The title of the complainant, and the fact of the infringement, may be established in the suit for an injunction. The subject, however, is one for the discretion of the court, and a trial at law

[1] Sickles *v.* Gloucester, 1 Fisher's Patent Cases, 222; Imlay *v.* Norwich, etc., R. R. Co., 4 Blatch. 227.

[2] Imlay *v.* Norwich *ut sup.*; High on Injunctions, § 623.

[3] See Kerr on Injunctions, 445; Stephens *v.* Cady, 14 Howard, 530; Hilliard on Injunctions, 525 *et seq.*

[4] Shortt on the Law of Literature and Art, 61 *et seq.*

[5] 4 Burr. 2408 note, 2 Bro. P. C. 129.

[6] Dudley *v.* Mayhew, 3 Comst. 9; High on Injunctions, § 641.

may be required as a prerequisite to the injunction, if the court should think proper.

It would not be within the scope of this work to describe in detail what are the subjects of copyright, and what will constitute an infringement of the right.

In this country the subjects of copyright are enumerated by Section 86 of the Act of Congress of 1870, which was passed for the purpose of amending, revising and consolidating the statutes upon the subject. By that section the benefit of the Act is extended to "any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, or any painting, drawing, chromos, statue, statuary, models or designs intended to be perfected as works of the fine arts;" and authors are empowered to reserve the right to dramatize or to translate their own works.

452. Piracy of a copyright is the unauthorized substantial appropriation of the labors of the original author.[1] *Bona fide* extracts, and quotations from a book, are not infringements of a copyright, nor is a *bona fide* abridgment. It is scarcely possible, however, to lay down any general rule upon this subject, as the question is one of degree rather than of kind, and the decision must, in most instances, depend upon the particular circumstances of the case under consideration. A few of the leading authorities upon this subject will be found in the note.[2]

It is no objection to an injunction that it will stop the sale of the work by which the copyright is infringed. If a man chooses to make an unlawful appropriation of another's work to such an extent that the original portions of his own book cannot be separated from the parts which have been improperly appropriated, he must pay the penalty for so doing.[3]

To constitute a piracy there must be a multiplication of copies of the original work. Any other use of it, such as for the purpose of public readings or recitations, will not be a

[1] Shortt on the Law of Literature and Art, 248.

[2] Folsom *v.* Marsh, 2 Story, 100; Blunt *v.* Patten, 2 Paine, 397; Gray *v.* Russell, 1 Story, 11; Story's Exrs. *v.* Holcombe, 4 McLean, 306; Stowe *v.* Thomas, 2 Am. Law Reg. 210.

[3] Jarrold *v.* Houlston, 3 K. & J. 708; Emerson *v.* Davies, 3 Story, 768.

piracy;[1] but any multiplication of copies, even though such new copies are not designed for sale, will be an infringement.[2]

453. There can be no copyright of works which are manifestly irreligious, immoral and obscene; and a court of equity will not interfere by injunction to protect such works. This rule, however, is one which requires to be applied with extreme caution and delicacy; for it is not unfrequently the case that what to one man would appear to be highly irreligious, would to another seem but a fair and candid investigation or criticism.[3]

It may be added that the jurisdiction of equity is exercised solely on the ground of protection to property; and that there is no jurisdiction to restrain the publication of improper or libellous works, merely on account of their mischievous character. Moreover, for a libel there is a complete remedy at law.[4]

454. While it is true (as it has been already stated), that after publication there can be no property in a literary production, yet before publication the rule is different, and the right to such property is exclusively in the producer, and any infringement of that right will be restrained by an injunction. It has been quaintly observed that the ideas of an author are like "birds in a cage, which none but he can have a right to let fly, for till he thinks proper to emancipate them they are under his own dominion."[5]

The leading case on this subject is that of Prince Albert *v.* Strange,[6] where Queen Victoria and her husband, for their own amusement, had made some etchings, and afterwards had lithographic impressions thereof struck off by means of a private press. Some copies having surreptitiously come into the hands of a workman, they were finally sold to Strange, a publisher, who appears to have been a *bona fide* purchaser. He prepared and printed a descriptive catalogue in which he announced the

[1] Reade *v.* Conquest, 9 C. B. (N. S.) 755; Tinsley *v.* Lacy, 1 Hem. & M. 747.

[2] Novello *v.* Sudlow, 12 C. B. 177.

[3] High on Injunctions, § 642; Story's Eq. Jurisq., § 936.

[4] Brandreth *v.* Lance, 8 Paige, 24. See also *post*, note at end of this chapter. Where the libel consists in the publication of something that is likely to injure the mercantile credit of the complainant, an injunction will issue. Dixon *v.* Holden, L. R., 7 Eq. 488.

[5] Millar *v.* Taylor, 4 Burr. 2378; Shortt on the Law of Literary Property, 49. Hilliard on Injunctions, 534.

[6] 1 MacN. & G. 42.

forthcoming publication of copies of the etchings. Upon a bill filed, not only was the publication of the etchings enjoined, but the catalogue also was declared to be a violation of the private right of property in the etchings.

This case, while it is a striking one, is by no means, however, the earliest decision upon the subject, as the right of property in unpublished literary productions and the consequent right to the protection of a court of equity, had been recognised long before.[1]

455. The questions which have most frequently arisen upon this subject are as to publication. If there has been a publication, the right is, of course, gone. But whether there has or has not been a publication is often a difficult question. The representation of a play at a theatre is not such a publication as will deprive the author of his common-law right.[2] And the publication of lectures was restrained before the passage of the Act of Parliament for their protection, on the ground of a breach of confidence.[3]

Equity will also restrain the publication of letters; for while the person who receives letters has a right to the possession thereof, he has only a property for a special purpose, and not for the purpose of publication.[4] Under certain circumstances, however, the recipient of letters *may* have a right to publish them; *e. g.*, where it is necessary to vindicate his character, or for the purposes of justice.[5] The writer of letters has a right to publish them; and this right cannot be controlled by the receiver.[6]

It may also be stated, that on general principles of equity, the publication of any manuscript will be restrained, when such publication would involve a breach of confidence or other violation of duty.

[1] In 1732. See Shortt on the Law of Literary Property, 54.

[2] Palmer *v.* De Witt, 2 Sweeney, 530. See, also, Keene *v.* Wheatley, 9 Am. Law Reg. 33, where the whole subject is examined at length by Mr. Justice Cadwalader.

[3] Abernethy *v.* Hutchinson, 3 L. J. Ch. 209.

[4] Pope *v.* Curl, 2 Atk. 342. See Hopkinson *v.* Burghley, L. R., 2 Ch. 447.

[5] Perceval *v.* Phipps, 2 V. & B. 25; Gee *v.* Pritchard, 2 Swanst. 428; Folsom *v.* Marsh, 2 Story, 100.

[6] Kerr on Injunctions, 186, 187.

[7] See Stapleton *v.* Foreign Vineyard Ass'n, 12 Weekly Rep. 976; Scheile *v.* Brakell, 11 Id. 796; Joyce on Injunctions, 350.

456. The jurisdiction of equity to restrain the infringement of trade-marks, is exercised for the protection of a legal right in property. Every man who manufactures or sells goods has the right to distinguish them from similar goods sold or manufactured by another; and for this purpose he has the further privilege of using some particular mark or symbol. This mark or symbol is known as a trade-mark, and it is used for the purpose of denoting that the article to which it is affixed is sold or manufactured by the party using the mark or by his authority, or that he carries on his business at a particular place.

It is an invasion of the right above stated for one man to sell his goods as those of another; and when this invasion is effected by means of counterfeiting or imitating a trade-mark or by making use of another trade-mark which is calculated to deceive the public into a belief that the spurious symbol is the original, such an invasion is an infringement of the property in the trade-mark, and will be restrained by a court of equity by its writ of injunction.[1]

The right of property in trade-marks was recognised in the common-law courts at an early date,[2] but a long period elapsed before such right was protected by injunction in a court of equity.[3] During the past thirty years, however, the jurisdiction of chancery in such cases has become thoroughly established, and has been frequently exercised; and very many authorities exist on both sides of the Atlantic wherein this species of property has been protected by writs of injunction.[4] In 1870, the legislative authority, also, stepped in to the aid of the judicial,

[1] See Bradley *v.* Norton, 33 Conn. 157; Leather Cloth Co. *v.* American Cloth Co., 11 H. L. Cas. 523.

[2] Southern *v.* How, Popham, 143. See Browne on Trade-Marks, chap. i.

[3] Blanchard *v.* Hill, 2 Atk. 484. See Dixon Crucible Co. *v.* Guggenheim, 2 Brewster, 326, for a discussion of the history of the law upon this subject.

[4] See Knott *v.* Morgan, 2 Keen, 213; Gout *v.* Aleploglu, 6 Beav. 69; Perry *v.* Truefitt, Id. 66; Croft *v.* Day, 7 Beav. 84; Farina *v.* Silverlock, 6 De G., M. & G. 214; Glenny *v.* Smith, 2 Dr. & Sm. 476; Edelsten *v.* Edelsten, 1 De G., J. & Sm. 185; Seixo *v.* Provezende, L. R., 1 Ch. 192; Ainsworth *v.* Walmsley, L. R., 1 Eq. 518; Braham *v.* Bustard, 1 Hem. & M. 447; Cocks *v.* Chandler, L. R., 11 Eq. 446; Banks *v.* Gibson, 34 Beav. 566; Dent *v.* Turpin, 2 Johns. & Hem. 139; Collins Co. *v.* Brown, 3 K. & J. 423; Emperor of Austria *v.* Day, 3 De G., F. & J. 217; Marshall *v.* Ross, L. R., 8 Eq. 651; Gillott *v.* Esterbrook, 47 Barb. 455; Congress and Empire Spring Co. *v.* High Rock Spring Co., 57 Barb. 526; 45 New York, 291; Woodward *v.* Lazar, 21 Cal. 448; Wal

and by an Act of Congress of that year, persons entitled to use any trade-mark, or who intended to adopt any for exclusive use, were granted protection for thirty years with a privilege of renewal, under certain restrictions, and upon compliance with the regulations prescribed by the Act.[1]

This Act, however, was, in 1879, declared unconstitutional by the Supreme Court.[2]

Indeed, the law upon the subject of trade-marks now occupies a large space in modern works on injunctions, and has grown into a system sufficiently extensive to call for a separate treatise;[3] and while an elaborate discussion of the authorities would undoubtedly be out of place in a work like the present, it will, nevertheless, be proper to refer very briefly to one or two of the decisions, and to the general principles which have been established.

In the Leather Cloth Co. *v.* The American Leather Cloth Co.,[4] the complainants sought to obtain an injunction restraining an alleged infringement of their trade-mark, which consisted of a certain device (the American Eagle) surrounded by words purporting to be a description of goods.

This description was false in certain particulars. The defendants made use of a trade-mark somewhat resembling that of the complainants, but not enough to deceive a purchaser using ordinary caution. Upon a bill being filed to restrain the use of the defendants' trade-mark as an infringement upon that of the plaintiffs, it was held by Lord Chancellor Westbury[5] that the complainants were not entitled to relief, because they themselves had been guilty of a false assertion calculated to deceive the public, and by the House of Lords, affirming his decision, that the difference between the two trade-marks was such that no infringement could be said to exist. This case therefore may be considered as establishing two propositions: first, that the trade-mark for which protection is sought must not itself deceive the public,[6] and secondly, that the imitation, to be an infringe-

ton *v.* Crowley, 3 Blatchf. C. C. 440; Hostetter *v.* Vowinkle, 1 Dillon C. C. 329; Filley *v.* Fassett, 44 Missouri, 168; Davis *v.* Kendall, 2 R. Island, 566.

[1] 16 U. S. Stat. at Large, 210.

[2] Trade-mark Cases, 10 Otto, 82.

[3] Browne on Trade-Marks.

[4] 11 H. L. Cas. 523.

[5] 10 Jurist, (N. S.) 81.

[6] The maxim that "he who comes into a court of equity must come with clean hand" applies in such cases; Palmer *v.* Harris, 10 P. F. Sm. 156. See, also, Pidding *v.* How, 8 Sim. 477;

ment, must be one calculated to deceive a purchaser using ordinary caution.

But it must be remembered that while the *test* of an infringement may be whether or not the public, exercising ordinary caution, are deceived, yet the *ground* upon which the jurisdiction of the court rests, in such cases, is not the fraud upon the public, but the invasion of property.[1]

457. Any name, symbol or emblem may, in general, be a trade-mark.

But a word which is merely descriptive of the article, or which is the current name of an article, or which merely denotes the general character of the business, cannot be used as a trade-mark.[2]

The name of a country or section of a country cannot be appropriated as a trade-mark by the owner of a particular product (*e. g.* coal), of that country, so as to exclude owners of other similar products coming from the same country or section of country from using the name.[3] But it seems that the use of the name of a country, by a person whose merchandise does not in fact come from that country, will be enjoined; and if the name of a country is stamped or branded upon the article, it may become a trade-mark.[4]

A man's name may be a trade-mark; and it may become one to such an extent as to prevent any other person of the same name from using his own name in connection with a similar article.[5]

Flavel *v.* Harrison, 10 Hare, 467. See, however, Ford *v.* Foster, L. R., 7 Ch. 611.

[1] See the opinion of Lord Westbury in 10 Jur. (N. S.) 81. See, also, Clark *v.* Freeman, 11 Beav. 112; Hirtch *v.* Jonas, L. R., 3 Ch. D. 584; Dixon Crucible Co. *v.* Guggenheim, 2 Brews. 232; Joyce on Injunctions, 312.

[2] Perry *v.* Truefitt, 6 Beav. 66; Raggett *v.* Findlater, L. R., 17 Eq. 29; Gillott *v.* Esterbrook, 47 Barb. 455; Caswell *v.* Davis, 58 N. Y. 223.

[3] Canal Co. *v.* Clark, 13 Wallace, 311. See, also, Newman *v.* Alvord, 49 Barb. 588; McAndrew *v.* Bassett, 10 Jur. (N. S.) 550; Seixo *v.* Provezende, L. R., 1 Ch. 192; Amoskeag Manufac. Co. *v.* Spear, 2 Sanf. Sup. Ct. 599; Boardman *v.* Meriden Britannia Co., 35 Conn. 402; Glendon Iron Co. *v.* Uhler, 25 P. F. Sm. 467; Kiney *v.* Basch, 16 Am. L. R. (N. S.) 596.

[4] McAndrew *v.* Bassett, 10 Jur. (N. S.) 550.

[5] Holloway *v.* Holloway, 13 Beav. 209; Burgess *v.* Burgess, 3 De G., M. & G. 896.

A man cannot acquire a trade-mark until the article to which it is applied is actually made and put in the market. Thus, an injunction was refused to a publisher who had announced, but had not actually published, a magazine called "Belgravia," to restrain another publisher who had hastily brought out another magazine bearing the same name, from continuing to use that title.[1]

458. In order to obtain relief for the protection of a trade-mark it is necessary that due diligence should be used, and it is further necessary that the trade-mark itself should not contain any misrepresentations; for (as stated above) a trade-mark which is false, and thereby calculated to deceive the public, will not be protected by a court of equity.[2]

Any imitation of a trade-mark whereby an ordinary purchaser might be deceived into the belief that the article he was buying was produced or manufactured by the owner of the trade-mark, is an infringement. It has often happened that differences have been introduced by persons desiring to infringe a trade-mark in order to escape from the rule above stated; but all such colorable differences are disregarded by the court, if the general result is a misrepresentation.[3]

The remedies which equity applies to cases of infringement of trade-marks, are those already noticed in patent-right and copyright cases, viz., an injunction, an account, and an inquiry into damages.

459. Another class of cases in which injunctions are issued, is where irreparable damages may be done by the alienation of property prior to or pending litigation, or even where no litigation may be in contemplation. One of the most striking instances of this class of cases is the restraining the transfer of negotiable instruments which have been fraudulently, illegally or improperly obtained, or which ought not to be negotiated.[4] From the nature of these instruments it is obvious that if they once get into the

[1] Maxwell *v.* Hogg, L. R., 2 Ch. 307; Walton *v.* Crowley, 3 Blatchf. C.C. 440; Clark *v.* Clark, 25 Barb. 76; Brooklyn White Lead Co. *v.* Masury, Id. 416; Williams *v.* Johnson, 2 Bosw. 1; Burke *v.* Cassin, 45 Cal. 467; Kerr on Injunctions, 484.

[2] Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523.

[3] See Leather Cloth Co. *v.* American Leather Cloth Co., 11 H. L. Cas. 523; Glenny *v.* Smith, 2 Dr. & Sm. 476; Seixo *v.* Provezende, L. R., 1 Ch. 192; Gillott *v.* Esterbrook, 47 Barb. 455;

[4] Smith *v.* Haytwell, Amb. 66; 3 Atk. 566; Kerr on Injunctions, 595.

hands of an innocent holder for value, irreparable injury may be done to the party liable thereon, by depriving him of the opportunity of making a defence which he would otherwise be entitled to set up. Hence, the jurisdiction to restrain the negotiation of such instruments upon a proper case being made out, is well established both in England and in this country.[1] So also transfers of stock; sales of valuable chattels to which the complainant claims title; sales and mortgages of estates by a mortgagor who had improperly obtained the deeds from a mortgagee; and vexatious alienations of property pending litigation, may all be restrained by injunction.[2] Equity, however, will not interfere to restrain a debtor from alienating his property, at the suit of a creditor who has not reduced his claim to judgment.[3]

460. Still, another class of cases in which equity interferes, is where property which is the subject of litigation is in danger of injury, and the interposition of the court is necessary for its protection. It will be remembered that technical waste could only exist when the party committing it was lawfully in possession, and that, therefore, if his claim was hostile, the remedy by injunction against waste, strictly speaking, did not lie.[4] Where, however, special circumstances exist, as when the party in possession is insolvent, and unable to respond in pecuniary damages; or where his actions are such as to deprive the land of its chief value, an injunction may issue to protect the property pending litigation.[5] This is especially so in the case of mines, for there

[1] Metler *v.* Metler, 3 C. E. Green, 270; 4 Id. 457. See Ferguson *v.* Fisk, 28 Conn. 501; Bridges *v.* Robinson, 2 Tenn. Ch. 720; High on Injunctions, § 712. See, also, Osborn *v.* The Bank of the United States, 9 Wheat. 738.

[2] Kerr on Injunctions, 590, 593, 594; High on Injunctions, § 251.

[3] Wiggins *v.* Armstrong, 2 Johns. Ch. 144; Buchanan *v.* Marsh, 17 Iowa, 494; High on Injunctions, § 250. See, also, in this connection, Ervin's Appeal, 1 Norris, (Pa.) 188. The rights of a judgment creditor will be protected so as to restrain the judgment debtor from committing acts in the nature of waste; Witmer's Appeal, 9 Wright, (Pa.) 455. See, also, Clark's Appeal, 12 P. F. Sm. 447; and Parker *v.* Garrison, 61 Ill. 250. In this last case an injunction was granted in favor of a landlord to restrain an insolvent tenant from transferring a crop of corn with which the rent was to have been paid.

[4] Pillsworth *v.* Hopton, 6 Ves. 51; Storm *v.* Mann, 4 Johns. Ch. 21. But see Shubrick *v.* Guerard, 2 Dess. 616, n.

[5] Erhardt *v.* Board, 113 U. S. 537; Meadow Valley *v.* Dodds, 6 Nev. 261; Kinsler *v.* Clarke, 2 Hill. Ch. 617; Hicks *v.* Michael, 15 Cal. 107; Peak *v.* Hayden 3 Bush, 125. See, also, Kane *v.* Vandenburgh, 1 Johns. Ch. 11.

the injury goes to the very substance of the estate.[1] But any injury which is not adequately reparable by damages, would be a sufficient foundation for the application.[2]

The object of the court in granting such injunctions is to preserve the property in *statu quo* pending litigation. The complainant, however, in order to obtain the relief must present a fair *prima facie* case; and in order to secure the decision of the court without a trial at law, the case must be very clear and plain.[3] In cases of a doubtful character, the court will either direct the complainant to establish his title at law in the first instance, or grant an injunction pending the litigation, according to circumstances, or the exigencies of the particular case. *Interim* orders are sometimes made, whereby the property is preserved without issuing the formal writ.[4]

461. The remedy by injunction to restrain the breach of negative covenants, may be said to furnish the complement to the relief by specific performance. An affirmative covenant is an agreement whereby a man undertakes that something shall be done; and upon the breach of such a covenant, and upon a proper case for equitable interference being made out, the remedy is by a bill for specific performance. On the other hand, by a negative covenant, the covenantor promises that something shall *not* be done; and, therefore, the relief appropriate to a breach of such a contract is an injunction.[5]

Injunctions to restrain breaches of negative covenants are issued when the contract and the threatened breach are clearly shown, and where the recovery of damages at law would furnish an inadequate redress. While the theory upon which this relief is based is that of preventing irreparable injury, yet the court will not enter into nice discrimination as to the extent of the damage. The mere fact that there has been a breach of covenant, is a sufficient ground for interference; and it is no answer to say that the act complained of will inflict no injury upon the complainant, or will even be a positive benefit to him.[6] Thus,

[1] U. S. *v.* Parrott, McAll. C. C. 271.

[2] Kerr on Injunctions, 199.

[3] Id. 208, 209.

[4] Id. 212.

[5] See Scott *v.* Burton, 2 Asnm. 325; Barrett *v.* Blagrave, 5 Ves. Jr. 55; Franklyn *v.* Tuton, 5 Madd. 469; Hills *v.* Miller, 3 Paige, 254; Watertown *v.* Cowen, 4 Paige, 510.

[6] Kerr on Injunctions, 532; High on Injunctions, §§ 595, 717. "If the construction of the instrument is clear, and

in Stewart *v.* Winters,[1] where a lease contained a clause restricting the use of the demised premises to the "regular dry goods jobbing business," and the lessee commenced selling goods at auction therein, it was held that, although there was no damage or irreparable injury done to the lessor, and the subject-matter did not amount to a nuisance at law, yet it was a breach of the covenant in the lease, and the landlord was entitled to an injunction.

462. The leading authority upon this subject is, perhaps, Lumley *v.* Wagner.[2] There the defendant had entered into an engagement with the plaintiff to sing at his theatre, and not to sing at any other theatre; and an injunction was granted by Lord St. Leonards restraining her from singing at any other theatre. It was held in that case, overruling the former decisions,[3] that the circumstance that the court would have been unable to specifically enforce the defendant's affirmative covenant to sing, did not affect the complainant's right to an injunction to restrain a violation of the negative covenant; and this is, perhaps, the correct doctrine, although there have been decisions the other way.[4]

463. The instances in which injunctions have been issued to restrain the breach of negative covenants are very numerous. Thus injunctions have been issued to restrain a person who had entered into a covenant not to ring church bells, from so doing;[5] to restrain an author, who, on the sale of a work, had covenanted with the purchaser not to do anything which might be detrimental to the sale or publication of that work, from publishing a rival work on the same subject;[6] to restrain tenants from

the breach clear, then it is not a question of damages, but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction." See Wood, V. C., in Tipping *v.* Eckersley, 2 K. & J. 264, 270. See, also, St. Andrew's Church's Appeal, 17 P. F. Sm. 518; Leech *v.* Schweder, L. R., 9 Ch. 463 (where the authorities are reviewed); Dickenson *v.* Gr. Junc. Canal, 15 Beav. 260; Kemp *v.* Sober, 1 Sim. (N. S.) 517, 520 (one of the earliest cases in which the doctrine was distinctly stated); and Ld. Manners *v.* Johnson, L. R., 1 Ch. D. 673.

[1] Stewart *v.* Winters, 4 Sandf. C. 587.

[2] 1 De G., M. & G. 604; Singer Sew. Mach. Co. *v.* Union Buttonnole Co., 1 Holmes, 253; Chic., &c., Rd. *v.* N. Y., L. E. & W. Rd., 24 Fed. R. 516; and Bowen *v.* Hall, 20 Am. Law Reg. 587.

[3] Kemble *v.* Kean, 6 Sim. 333; Kimberly *v.* Jennings, Id. 340; Kerr on Injunctions, 528.

[4] Sanquirico *v.* Benedetti, 1 Barb. 315; Hills *v.* Croll, 2 Phillips, 60; Fothergill *v.* Rowland, L. R., 17 Eq. 132; Allegheny Base Ball Club *v.* Bennett, 14 Fed. Rep. 259.

[5] Martin *v.* Nutkin, 2 P. Wms. 266.

[6] Barfield *v.* Nicholson, 2 Sim. & St. 1

violating covenants in their leases as to the mode of cultivation, or the removal of machinery;[1] to restrain the erection of buildings beyond a certain height;[2] to restrain the erection or compel the removal of bay-windows;[3] to restrain the use of building lots except for the erection of dwellings;[4] to restrain the carrying on of particular trades in demised premises;[5] and in many other cases too numerous to mention.[6] The jurisdiction is frequently exercised for the purpose of enforcing contracts in proper restraint of trade,[7] the principles of which have been already explained; and also to enforce covenants which do not run with land, but of which the vendee had notice, and of which an observance on his part will, therefore, be compelled in equity.[8]

The mere fact that the covenant provides for a penalty upon its breach, is no ground for refusing an injunction.[9]

464. A negative quality will sometimes be imported into an affirmative covenant, and relief afforded by injunction. Thus lessees who had covenanted to manage land or cultivate a farm in a husband-like manner, have been restrained from doing acts of bad-husbandry, although there was no express covenant to refrain from such acts.[10] And where two parties who were

[1] Fleming *v.* Snook, 5 Beav. 250; Grey de Wilton *v.* Saxon, 6 Ves. 106; Pulteney *v.* Shelton, 5 Id. 260, n.; Hamilton *v.* Dunsford, 6 Irish Ch. 412.

[2] Lloyd *v.* London, Chatham and Dover Ry. Co., 2 De G., J. & Sm. 568.

[3] Lord Manners *v.* Johnson, L. R., 1 C. D. 673; Western *v.* McDermott, L. R., 1 Eq. 499.

[4] St. Andrew's Church's Appeal, 17 P. F. Sm. 512.

[5] Kemp *v.* Sober, 1 Sim. N. S. 517; Hodson *v.* Coppard, 29 Beav. 4; Clements *v.* Welles, L. R., 1 Eq. 200; Parker *v.* Whyte, 1 Hem. & M. 167.

[6] Kerr on Injunctions, 503, 504, 505. See, also, Wolverhampton, etc., Rd. *v.* London, etc., Rd., L. R., 16 Eq. 433; Nuneaton Local Board *v.* General Sewage Co., L. R., 20 Eq. 127.

[7] Butler *v.* Burleson, 16 Vt. 176; McClurg's App., 8 P. F. Sm. 51; Doty *v.* Martin, 32 Mich. 462; Guerand *v.* Dandelet, 32 Md. 561; Gill *v.* Ferris, 82 Mo. 156; Diamond M. Co. *v.* Rober, 35 Hun, 421; Jones *v.* North, L. R., 19 Eq. 426.

[8] Tulk *v.* Moxhay, 11 Beav. 571; 2 Ph. 774; Frye *v.* Partridge, 82 Ill. 267. See, also, Clements *v.* Welles, L. R., 1 Eq. 200; Wilson *v.* Hart, L. R., 1 Ch. 463; Western *v.* Macdermott, 2 Id. 72; Master *v.* Hansard, L. R., 4 Ch. D. 718 (where an injunction was refused); Richards *v.* Revitt, L. R., 7 Ch. D. 224; Cooke *v.* Chilcott, L. R., 3 Ch. D. 694; Sayres *v.* Collyer, 24 Ch. D. 180; Haywood *v.* Brunswick Building Soc., 8 Q. B. Div. 403; Pollock on Con. 229; Brew *v.* Van Deman, 6 Heisk. 433.

[9] Hardy *v.* Martin, 1 Cox Ch. 26. See *ante*, p. 236, and authorities cited in note 3. See, however, Hahn *v.* The Concordia Society, 42 Maryl. 460.

[10] Drury *v.* Molins, 6 Ves. 328; Pratt *v.* Brett, 2 Madd. 62; Briggs *v.* Law, 4 Johns. Ch. 23; Kerr on Injunc. 522.

jointly interested in land, entered into an agreement by which one was to have a power of sale to be exercised at such time as he might deem proper, the court will restrain an improper exercise of the power, and will specifically carry out the agreement by appointing a receiver to make sales.[1] But where the affirmative agreement cannot be specifically enforced, the court will not import into it a negative covenant. Thus, where a defendant had agreed to take notes of cases in court, and compose reports for the plaintiff, but had failed to do so, an injunction to restrain him from making reports for other persons was refused.[2] Other instances will be found in the cases cited in the note.

Injunctions to restrain breaches of covenant may, if the occasions require it, be of a mandatory character.[3]

465. The last class of cases in which injunctions are granted, which will be particularly noticed, embraces those in which the writ is issued in the case of corporations.

Many cases of this description fall under the jurisdiction of equity upon the subject of trusts; and this jurisdiction, of course, authorizes a court of chancery to interfere wherever the property of a corporation can, under the conditions of its corporate birth, be treated as trust funds, and there is an attempt to apply the property to purposes foreign to the objects of the corporation, in other words, foreign to the trust. The theory upon which the remedy by injunction is administered in such cases is, simply, that the court will interfere to prevent a breach of trust.[4] Thus it has been held in several cases, that where property is conveyed to a religious corporation upon the trust, either expressed or sufficiently implied, that it is to be held for the benefit of a set of men holding certain religious doctrines, the court will interfere to restrain a use of the property for the benefit of those who do not hold the prescribed doctrines,[5]

[1] Marvine *v.* Drexel, 18 P. F. Sm. 362.

[2] Clarke *v.* Price, 2 Wils. C. C. 157; Pickering *v.* Bishop of Ely, 2 Y. & C. C. C. 249; Johnson *v.* Shrewsbury and Birmingham Ry., 3 De G., M. & G. 914; Kerr on Injunc., 524. The distinction between these cases, and cases such as Lumley *v.* Wagner (*supra*), is that in the latter the negative covenant was *expressed*.

[3] Lane *v.* Newdigate, 10 Ves. 192; Whittaker *v.* Howe, 3 Beav. 383; Kerr on Injunctions, 534.

[4] See Crandall *v.* Lincoln, 52 Conn. 73.

[5] Schnorr's Appeal, 17 P. F. Sm. 138; Roshi's Appeal, 19 Id. 462; Kerr's Appeal, 8 Norris, 97; O'Hara *v.* Stack, 9 Id. 477; Watson *v.* Jones, 13 Wall. 679; Girard Township *v.* Girard Borough, 34 Leg. Int., (Sup. Ct. Pa.) 382;

and to compel a restoration to the complainants of the property in dispute, and the exercise of the privileges whereof the defendants have deprived them.[1]

A corporation which encroaches upon the rights of property or possession of another may be restrained. Thus a railroad company may be enjoined from exercising a right of entry under a concession, when it is violating a condition, subject to which the right has been granted;[2] or from taking land under statutory authority without making the compensation required by law.[3]

The ground upon which the jurisdiction of courts of chancery in cases of injunction to restrain corporate action has been put by text writers of very considerable authority, is solely a breach of trust;[4] but it is submitted, with deference, that this view of the jurisdiction is somewhat too limited, for it would seem that a court of equity would usually interfere to restrain acts of corporations *ultra vires*, when these acts resulted, or were likely to result, in injury to the stockholders, without regard to the question whether there had been a technical breach of trust. Be this as it may, the equity jurisdiction in the United States over corporations has been very extensively exercised. Thus, in Pennsylvania this is not only one of the distinct heads of jurisdiction conferred by statute,[5] but it has been treated as one of those equitable powers which are inherent in courts of chancery.[6] Bills to restrain corporate action within proper limits are, therefore, very frequent in the United States, and they are used in cases of corporations of a municipal and public kind, as well as those of a private, or mercantile, or eleemosynary char-

Hale *v.* Everett, 53 N. H. 9; Chaffee *v.* Quidnick Co., 14 R. I. 75; High on Injunctions, Ch. V.

[1] Kisor's Appeal, 12 P. F. Sm. 435. See, also, Kerr *v.* Trego, 11 Wright, 296; Sutter *v.* The Dutch Church, 6 Id. 503; Gass's Appeal, 23 P. F. Sm. 47; Henry *v.* Deitrich, 3 Norris, 292.

[2] See Unangst's App., 5 P. F. Sm. 128. See, also, Milhau *v.* Sharp, 28 Barb. 228; Evans *v.* Mo., Ia. and Neb. Ry. 64 Mo. 453; and McIntyre *v.* Storey, 80 Ill. 127, (a bill to restrain town officers from removing plaintiff's fences).

[3] East and West Rd. *v.* East Tenn., Va. & Ga. Rd., 75 Ala. 275. See, also, Neemeyer *v.* L. R. Junc. Ry., 43 Ark. 111.

[4] Kerr on Injunctions, 570; High on Injunctions, § 761.

[5] See *ante*, Introduction, Chap. I., p. 26, note.

[6] See Commonwealth *v.* The Bank of Pennsylvania, 3 W. & S. 193; Baptist Church *v.* Scannel, 3 Grant, 48; Sawer *v.* Gosser, 1 W. N. C. 55; Sterling's Appeal, 111 Pa. St. 41; Kerr on Receivers, (2 Am. ed.) 80, note 1.

acter.[1] The jurisdiction of the court may, also, be invoked to prevent the franchise of a corporation from being destroyed.[2]

A corporation, however, cannot be compelled to perform a public duty at the suit of a private individual, without some special right or authority.[3]

In leaving the subject of injunctions, it should be remembered that the examples given of the application of this equitable remedy to the cases which have been discussed, are, after all, only illustrations of the jurisdiction, and are not to be regarded as an exhaustive catalogue of all the cases in which this remedy can be applied. The field of this jurisdiction is an exceedingly wide one, and scarcely any injury to the rights of property can be imagined where the writ would not issue, if the remedy at law was inadequate, and the only efficient redress would be the *restraint* of the commission or continuance of the wrongful act.[4]

[1] See Delaware and Raritan Canal *v.* Raritan and Delaware Bay R. R. Co., 1 C. E. Green, 378; Newark Plank Road Co. *v.* Elmer, 1 Stockt. 754; Kean *v.* Johnson, Id. 401; Gifford *v.* The New Jersey R. R. Co., 2 Id. 171; People *v.* New York, 32 Barb. 102; Scofield *v.* Eighth, etc., 27 Conn. 499; Sheldon *v.* Centre, etc., 25 Id. 224; Commonwealth *v.* Bank, 4 Allen, 1; Matthews *v.* Skinker, 62 Mo. 329; March *v.* Eastern Railway Co., 40 N. Hamp. 548; Philadelphia and Erie R. R. Co. *v.* Catawissa R. R. Co., 3 P. F. Sm. 20; Winebrenner *v.* Colder, 7 Wright, (Pa.) 244; Manderson *v.* Commercial Bank, 4 Casey, 379; Houston *v.* Jefferson College, 13 P. F. Sm. 428; Sturges *v.* Knapp, 31 Verm. 1; Stevens *v.* Rutland and Burlington R. R., 29 Id. 545; Nazro *v.* Merchants' Ins. Co., 14 Wis. 295; Curtenius *v.* Hoyt, 37 Mich. 583; Grand Trunk Railway *v.* Cook, 29 Ill. 237; Carter *v.* City of Chicago, 57 Id. 283; Cobb *v.* The Illinois & St. Louis R. R. Co., 68 Id. 233; Durfee *v.* Old Colony R. R. Co., 5 Allen, 230; Peabody *v.* Flint, 6 Id. 52; Dodge *v.* Woolsey, 18 How. 341. See, also, Colman *v.* Eastern Counties Railway Co., 10 Beav. 1; Simpson *v.* The Hotel Co., 8 H. L. Cas. 712. A court of equity will direct an account to be taken of corporate debts, and the amounts respectively due by shareholders on assessments to be ascertained—this to prevent a multiplicity of suits, and in lieu of proceedings by mandamus to compel directors to make calls. The Dalton, &c., R. R. Co. *v.* McDonald, 56 Ga. 191.

[2] Osborn *v.* Bank of the United States, 9 Wheat. 738.

[3] Buck Mountain Co. *v.* Lehigh Coal Co., 14 Wright, (Pa.) 91. Upon the general subject of the jurisdiction of equity by way of injunction over companies and corporations, see Redfield on Railways, 325; Kerr on Injunctions, chaps. xxiii. and xxiv.; and High on Injunctions, chaps v. and xiii.

[4] But it is the rights of *property*, or rather rights *in* property, that equity interferes to protect; a party is not entitled to a writ of injunction for a matter affecting his person. Kerr on Injunctions, 1; Att. Gen. *v.* Sheffield Gas Co., 3 De G., M. & G. 320; Emperor

CHAPTER III.

RE-EXECUTION, REFORMATION, RESCISSION AND CANCELLATION.

466. Reason for the existence of these equitable remedies.
467. Re-execution.
468. Reformation.
469. General principles in such cases.
470. Admissibility of parol evidence.
471. Reformation under presumption of law.
472. Rescission; voidable contracts, how far good.
473. Cancellation as applied in the rescission of voidable contracts.
474. Cancellation independent of rescission.
475. Relief by rescission and cancellation a matter of judicial discretion.
476. Compensation.
477. Rule in England; Sir Hugh Cairns's Act.
478. No uniform rule on this subject in the United States.

466. It has been stated in a former chapter that in order to render the circle of equitable relief in the case of contracts and

of Austria *v.* Day, 3 De G., F. & J. 217. And this rule is now carried to the extent of holding that where the *gist* of the injury is purely personal (as, for instance, in cases of libel), the fact that it may be injurious to property does not give the court jurisdiction. This has been distinctly stated by Chief Justice Gray (of Massachusetts) in a recent case. In the Boston Diatite Co. *v.* Florence Manufacturing Co., 114 Mass. 70, that distinguished judge said: "The jurisdiction of a court of chancery does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract. Gee *v.* Pritchard, 2 Swanst. 403–413; Seeley *v.* Fisher, 11 Sim. 581–583; Fleming *v.* Newton, 1 H. L. Cas. 363, 371–376; Emperor of Austria *v.* Day, 3 De G., F. & J. 217, 238–241; Mulkern *v.* Ward, L. R., 13 Eq. 619. The opinions of Vice-Chancellor Malins in Springhead Spinning Co. *v.* Riley, L. R., 6 Eq. 551; Dixon *v.* Holden, L. R., 7 Eq. 488; and in Rolling *v.* Hinks, L. R., 13 Eq. 355, appear with us to be so inconsistent with these authorities and with well-settled principles, that it would be superfluous to consider whether, upon the facts before him, his decisions can be supported. The jurisdiction to restrain the use of a name or trade-mark, or the publication of letters, rests upon the ground of the plaintiff's property in his name, trade-mark, or letters, and of the defendant's unlawful use thereof. Routh *v.* Webster, 10 Beavan, 561; Leather Cloth Co. *v.* Amer. Leather Cloth Co., 11 H. L. Cases, 523; Maxwell *v.* Hogg, L. R., 2 Ch. 307, 310, 313; Gee *v.* Pritchard, 2 Swanst. 403." The same rule was recognised in Whitehead *v.* Kitson, 119 Mass. 484; Prudential Assurance Co. *v.* Knott, L. R., 10 Ch. 142; Singer Manufacturing Co. *v.* Domestic Sewing Machine Co., 49 Georgia, 70; Life Association of America *v.* Boogher,

duties complete, it is necessary that not only should a suitor in chancery obtain redress by virtue of bills for specific performance and injunction, but that there should also exist some remedy by means of which a lost writing may be supplied, an instrument which has been erroneously framed corrected, and documents obtained through fraud or *duress* surrendered. Hence, there arises the necessity for bills for Re-execution, Reformation and Cancellation, which may be appropriately considered immediately after the subjects of the two preceding chapters.

467. The remedy of Re-execution is applicable to cases in which deeds or other instruments are lost or destroyed; and is the method by which equities growing out of accident are sometimes enforced. Very frequently, in cases of accident, the redress which a party seeks is not only that the lost instrument shall be re-executed, but that further relief shall be administered by directing a performance on the part of the defendant of the duty for which he was bound by the instrument, and for the non-performance of which, were it not for the loss, he could have been held answerable in a common-law action. Thus, in former times, and when the strictness of the common-law rule in regard to *profert* had not been relaxed,[1] the relief in equity in the case of a lost bond extended not only to re-execution, but also, for the purpose of avoiding circuity of action, to a decree for the payment of the debt.[2] In such a case (it will be observed) the object of the complainant is to obtain a payment of the money due upon the bond, to accomplish which he was originally compelled to resort to equity in consequence of a rule of pleading which prevented his recovery in a common-law action. Here, therefore, the ultimate relief sought is not re-execution, but payment.

But cases may sometimes arise in which re-execution is the principal or only redress which is required; and here the equitable remedy now under consideration is particularly called into play. An illustration of the necessity for this remedy may be found in those cases in which a deed has been lost, and a title is, therefore, in danger of being rendered unmarketable

11 Am. Law Rev. 617 (St. Louis Court of App.); Kidd *v.* Horry, 18 W. N. C. 287; Alto Carbon Light Co. *v.* Crystal Carbon Light Co., C. C. of U. S., 3d Circuit, Bradley, J. See Thorley's Cattle Food Co. *v.* Massam, L. R., 6 Ch. Div. 582; Saxby *v.* Easterbrook, L. R., 3 C. P. Div. 339; Loog *v.* Bean, App. Cas., 23 Am. L. R. 701, notes, where the subject is fully discussed.

[1] *Ante*, p. 232.

[2] Adams's Eq. 167.

by the absence of one of the links in the chain. Thus, if a conveyance to a purchaser has accidentally been burned, the seller will be compelled upon a resale to join in a conveyance to the new purchaser, or, if the estate be not resold, to again convey to the first purchaser.[1] In a case of this kind the interposition of the chancellor is sought solely upon the ground of the efficiency of the equitable remedy, and no relief is asked for beyond the simple re-execution of the lost or spoliated instrument. Of course in applying this remedy the court will act in obedience to the general principles by which its interposition is usually regulated; and as one of those principles consists in the discouragement of carelessness or negligence, a decree may be refused if the loss or destruction of the instrument has happened through the fault of the complainant.[2]

468. The remedy of Reformation is obviously one which is necessary to the complete and exact administration of justice; and which, moreover, can be attained by equitable procedure alone. A court of law may construe and enforce an instrument as it stands,[3] or may refuse upon proper cause shown to give any effect to it, or may treat it as a nullity. But it is plain that if the instrument has not been drawn so as to express the true intention of the parties, to enforce it in its existing condition would be simply to carry out the very mistake or fraud complained of; while to set it aside altogether might deprive the plaintiff of the advantages of a contract to which he is lawfully entitled. It is obvious, therefore, that the only true measure of justice in such a case is the equitable remedy by reformation (or correction, as it is sometimes called), by means of which the instrument is made to conform to the intention of the parties, and is then enforced in its corrected shape.[4]

The occasions which most frequently give rise to this equitable remedy are cases of mistake and fraud. Thus, where a settlement is executed with the design of carrying out prior articles, but which is so drawn by mistake that it fails to conform to the intention as expressed in the articles, a bill in equity

[1] Bennett *v.* Ingoldsby, Finch, 262. See Cummings *v.* Coe, 10 Cal. 529; 2 Sug. V. and P. 41 (8th Am ed.).

[2] See Hoddy *v.* Hoard, 2 Carter, (Ind.) 474.

[3] The mere *construction* of a deed, where there is no fraud, accident or mistake, is not a proper subject of jurisdiction in equity; Grubb's Appeal, 9 Norris, 228.

[4] Cubberly *v.* Cubberly, 39 N. J. Eq. 514.

will lie for the purpose of reforming the instrument so that the original intention of the parties to the settlement may not be defeated.[1] And so where, through artifice, the written evidence of a contract is drawn in such way that the terms of the agreement are not accurately expressed, the party injured by the fraud may come into equity for the purpose of having the instrument corrected, and the contract, as reformed, enforced.

Bills which seek to have absolute deeds declared to be mortgages, and for the consequent enforcement of the mortgagor's equity of redemption, are illustrations of this species of reformation.[2]

469. The nature of mistake and fraud has been attempted to be explained in former chapters. What we have to do with now is the method in which the court applies the equitable remedy of reformation, for the purpose of redressing injuries growing out of mistake or fraud.

The general principles by which the court is guided in such cases are well settled. A person who seeks to rectify a deed on the ground of mistake must establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable, continued concurrently, in the minds of all parties, down to the time of its execution; and, also, must be able to show exactly and precisely the form to which the deed ought to be brought.[3]

To *reform* a contract, and then enforce it in its new shape, calls for a much greater exercise of the power of a chancellor than simply to set the transaction aside. Reformation is a much more delicate remedy than rescission. Hence, in order to justify a decree for reformation in cases of pure mistake, it is necessary that the mistake should have been mutual.[4] Where the mistake has been on one side only, the utmost that the party desiring relief can obtain is recission, not reformation.[5] The case is, of course, different if any element of fraud exists; for it

[1] Glenorchy *v.* Bosville, 1 Lead. Cas. Eq. 20, and notes; Perry on Trusts, § 359; *ante*, p. 88.

[2] See *ante*, Ch. on Mortgages.

[3] By the Lord Chancellor in Fowler *v.* Fowler, 4 De G. and J. 265. See, also, Stockbridge *v.* Hudson Iron Co., 107 Mass. 290.

[4] *Ante*, p. 246, and cases cited in the notes.

[5] Bellows *v.* Stone, 14 N. H. 175; Cooper *v.* The Farmers' Ins. Co., 14 Wright, (Pa.) 299; Douglass *v.* Grant, 12 Ill. App. 273.

has been properly held that where there is a mistake on one side, and fraud on the other, there is a case for reformation.[1]

470. The difficulties which arise in these cases grow, principally, out of questions of evidence. Where the instrument recites an agreement which it professes to carry out, but fails to do so, the case for reformation is perfectly clear; but where there is no recital of any prior agreement, but the alleged mistake is attempted to be proved by extrinsic evidence, the limits of the equity for correction are more difficult to define.[2] The distinction which ought to be borne in mind seems to be between those cases in which the intention of the parties has not been accurately expressed, and those in which the intention, though accurately expressed, has been reached through some misapprehension or ignorance.[3] In the first class of cases the true remedy is reformation, and evidence is admissible to show what the intention of the parties really was. Thus, to refer to an instance cited in a former chapter, if there is an agreement that part of the purchase-money of certain real estate should be paid by a judgment note for a certain sum, "with interest," and these words are omitted from the note by mistake, it is competent to show this omission by parol evidence for the purpose of obtaining a decree correcting the instrument.[4] The general principle, therefore, that where no statutory provision intervenes, parol evidence is admissible for the purpose of correcting a mistake in a written instrument, and of carrying it into effect as corrected (in other words, for the purpose of applying the equitable remedy of reformation), has, accordingly, been adopted by many decisions throughout the United States; but relief will be granted only where there is a plain mistake clearly made out by satisfactory proofs.[5] The same result now seems to have been reached

[1] Welles *v.* Yates, 44 N. Y. 525; Hitchens *v.* Pettingill, 58 N. H. 386.

[2] Adams's Eq. 169. See Bold *v.* Hutchinson, 5 De G., M. & G. 558, 568; 2 Spence Eq. 140, 141.

[3] See *ante*, p. 244.

[4] Gump's Appeal, 15 P. F. Sm. 476; and see the other cases cited, *ante*, p. 245, notes.

[5] See Gillespie *v.* Moon, 2 Johns. Ch. 595; Lyman *v.* Little, 15 Vt. 576; Whitney *v.* Whitney, 5 Dana, 330; Stockbridge *v.* Hudson Iron Co., 107 Mass. 290; Cummins *v.* Balgin, 37 N. J. Eq. 476; 1 Sug. V. and P. 262 (8th Am. ed.); notes to Woollam *v.* Hearn, 2 Lead. Cas. Eq. 683 (3d Am. ed.); Whart. on Ev., § 1019 *et seq.* (where the subject is thoroughly discussed and the authorities collected); *ante*, p. 245.

in England; although there is great reluctance to admit parol testimony unless it is corroborated by other evidence.[1] And on both sides of the Atlantic it now seems to be established that the courts may, under certain circumstances, and when the parol evidence is very conclusive, grant the relief sought, even though the mistake is denied by the answer of the defendant.[2]

Where the statute of frauds intervenes, the admissibility of parol evidence is necessarily attended with greater difficulty. The authorities upon this subject have already been noticed in the chapter on specific performance; it will, consequently, be sufficient to refer to the conclusion there stated.[3]

In cases of fraud there is less reluctance to admit parol evidence for the purpose of reforming a written contract than in cases of bald mistake.

Thus it was said in a former chapter that parol evidence was admissible for the purpose of showing that a deed absolute on its face was intended to be a mortgage, and, therefore, that the grantor should be entitled to avail himself of his equity of redemption.[4] This is the rule in most of the States of the Union;[5]

[1] See Alexander *v.* Crosbie, Ll. & G. (temp. Sug.) 145; Mortimer *v.* Shortall, 2 Dr. & War. 363; Kerr on Fraud and Mistake, 423; 1 Sug. V. and P. 262 (8th Am. ed.).

[2] Fowler *v.* Fowler, 4 De G. & J. 273; Gray *v.* Woods, 4 Blackf. 432. See, also, the cases cited in the two preceding notes; and Kerr on Fraud and Mistake, and Sug. V. and P., *ut sup.*

[3] See *ante*, p. 445, *et seq.* This subject was elaborately examined in the case of Glass *v.* Hulbert, 102 Mass. 31, where the rule was said to be that "when the proposed reformation of an instrument involves the specific performance of an oral agreement within the statute of frauds, or when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right, which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defence" (citing Jordan *v.* Sawkins, 1 Ves., Jr. 402; Osborn *v.* Phelps, 19 Conn. 63; Clinan *v.* Cooke, 1 Sch. & Lef. 22); but that "a rectification, by making the contract include obligations or subject matter, to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the statute of frauds as if there were no writing at all." See also article in 24 Am. Law Reg. 81.

[4] *Ante*, p. 203.

[5] Russell *v.* Southard, 12 Howard, 139; Morgan *v.* Shinn, 15 Wal. 105; Marks *v.* Pell, 1 Johns. Ch. 594; Horn *v.* Keteltas, 46 N. Y. 605; Sweet *v.* Parker, 7 C. E. Green, 453; Odenbaugh *v.* Bradford, 17 P. F. Sm. 96; Maffitt *v.* Rynd, 19 Id. 387; Conner *v.*

but in Massachusetts, Maine, Connecticut, New Hampshire, and perhaps some other States, parol evidence, in such cases, seems to have been considered inadmissible;[1] although in some of these States the question cannot, perhaps, be considered as definitely settled.[2]

471. In addition to reforming instruments by direct evidence, in cases of fraud or mistake, correction will be sometimes made by presumption of law, or rather of equity.[3] Thus, where a joint and several debt exists, and a bond is afterwards given to secure the same which is drawn in such a way as to make the obligation merely joint, and not joint and several, equity will reform the instrument upon the presumption that the writing by which the debt was to be secured was intended to follow in its terms the nature of the debt itself, and the correction will therefore take place in favor of the presumed intention of the parties.[4] Indeed, some cases have gone still further, and it has been held that whenever a loan is made to two jointly it will be presumed in equity that every debtor was to be permanently liable until the money should be paid; and that, therefore, a debt so arising, though at law it is the joint debt of all the co-debtors, shall be treated in equity as the several debt of each;[5] but it has been doubted whether these authorities have not carried the doctrine under consideration too far.[6] The doctrine will not apply when the original creation of the debt was in the form of a joint obligation, for in such a case there can be no presumption that the contract of the parties was meant to assume a different shape, and equity will not interfere upon conjecture merely.[7] Nor will such a presumption be entertained in a case of a mere surety,

Chase, 15 Verm. 764; Bank of Westminster *v.* Whyte, 1 Maryl. Ch. 536; 3 Id. 508; Webb *v.* Rice, 6 Hill. 219; Conwell *v.* Evill, 4 Blackf. 67; Sugden V. and P. 267, note; 2 Wash. Real Prop. 50 *et seq.*; *ante*, p. 203, note 2.

[1] 1 Sugden V. and P. 267, note.

[2] See Newton *v.* Fay, 10 Allen, 505; Howe *v.* Russell, 36 Maine, 115.

[3] Wyche *v.* Greene, 11 Geo. 172.

[4] Hyde *v.* Tanner, 1 Barb. 75; Weaver *v.* Schryock, 6 Serg. & R. 262; Pickersgill *v.* Lahens, 15 Wallace, 144. See, also, Stiles *v.* Brock, 1 Barr, 215.

[5] Simpson *v.* Vaughan, 2 Atk. 31; Thorpe *v.* Jackson, 2 Y. & C. Exch. 553. See United States *v.* Price, 9 How. 103.

[6] Jones *v.* Beach, 2 De G., M. & G. 886.

[7] Summer *v* Powell, 2 Meriv. 30; Underhill *v.* Horwood, 10 Ves. 209; Jones *v.* Beach, 2 De G., M. & G. 886; Moser *v.* Libenguth, 2 Rawle, 428.

whose duty is measured solely by the legal force of the bond, and who is under no moral obligation to pay the obligee independent of his covenant. There is nothing, therefore, in such a case, on which to found an equity for the interposition of a court of chancery.[1] Where, however, the evidence plainly establishes the fact that the intention of the parties was to make the instrument several as well as joint, it will be reformed even as against the estate of one who was only a surety.[2]

Upon the same principle of reformation, if a mortgage is made of a wife's property, and the equity of redemption is limited to the husband alone, and it appears from all the circumstances of the case that nothing more was intended to affect it (the property of the wife) than the creation of a mortgage, equity will interfere by reforming the instrument, and restoring the equity of redemption to the wife.[3]

472. It has been stated in a former chapter that in certain cases of fraud and mistake the proper redress which ought in justice to be afforded to the injured party is that the transaction into which he has entered should be set aside, and the written evidence thereof surrendered or destroyed. Some of the rules also upon which a court of equity acts in cases of rescission have been attempted to be pointed out; such as those which relate to the admissibility of parol evidence in such cases, and those also by which the loss of the complainant's right to relief through confirmation, acquiescence, or delay is controlled. In addition to the above, it may be stated here, that a transaction which is capable of being rescinded on the ground of fraud, is to be treated as good until rescinded, and not as bad until confirmed; or, in other words, that a contract which *may* be set aside at the option of the injured party, is to be considered as being in effective operation until that party takes measures to enforce his right to rescind.[4] This was well put by Mr. Mellish,[5] in his argument in Oakes *v.* Turquand before the House of Lords, in the following query: when you say that an agreement is void-

[1] Pickersgill *v.* Lahens, 15 Wallace, 144.

[2] Olmsted *v.* Olmsted, 38 Conn. 318.

[3] Demarest *v.* Wynkoop, 3 John. Ch. 129; Whitebread *v.* Smith, 3 De G., M. & G. 737.

[4] It will be remembered that the injured person must, in many cases, be very prompt. See *note*, § 260. See, also, Baker *v.* Lever, 67 N. Y. 304.

[5] Afterwards Lord Justice Mellish.

able and not void, and when the complainant endeavors to insist upon his right to treat it as void, is the agreement to be taken as valid until rescinded, or, when rescinded, to be taken to have been void from the first? And this query was answered by the tribunal to which it was addressed to the effect that the agreement *was* to be taken as subsisting until rescinded; but with this important qualification, that it was not to be considered as rescinded only as of the date of the decree of the court setting the transaction aside, but as of the date of the unequivocal and open declaration of the injured party that he demands a rescission, followed, upon a refusal, by a prompt application to the courts.[1]

Rescission, however, is a *right* of the complainant, and not a means for the assertion thereof; it is an *equity*, rather than an equitable remedy. In enforcing this equity, a court of chancery will, as the necessities of the case require, afford relief either by directing a reconveyance, or by simply ordering an instrument to be surrendered for cancellation. This relief is based upon equities which have been already considered, viz., fraud and mistake;[2] and the decrees which are made in such cases are naturally in accordance with the general course and practice of chancery, which always aims at specific relief.

473. Where a decree for the delivery up and cancellation of an instrument is made in such cases, it is founded upon the theory that a man suffers a wrong where an instrument is left outstanding, which is the evidence of a void or voidable transaction, and which could only be used for a sinister purpose. Even, therefore, where the instrument is *void*, the decree may contain a direction for its delivery and cancellation;[3] *à fortiori*, will this be done where the instrument is evidence of a merely voidable transaction,[4] and above all if it is of a negotiable character.[5]

474. But in some cases the right of the complainant to resort

Oakes *v.* Turquand, L. R., 2 H. L. Cas. 325. See, also, Reese River Mining Co. *v.* Smith, 4 Id. 64; and Wharton on Evidence, § 1017 *et seq.*, upon the general subject of rescission.

[2] See Geddes's Appeal, 30 P. F. Sm. 442; Stephen & Wife's App., 6 Norris, 202; and Babcock *v.* Day, 104 Pa.St. 4.

[3] Hamilton *v.* Cummings, 1 Johns. Ch. 520 to 524; Smith *v.* Pearson, 24 Alab. 358; *Post*, § 575; Hays *v.* Hays, 2 Ind. 28; Story's Eq. Jurisp., § 700.

[4] See Bromley *v.* Holland, 7 Ves. 3; Wilson *v.* Getty, 7 P. F. Sm. 266. See, also, Hartford *v.* Chipman, 21 Conn. 488; Foley *v.* Kirk, 33 N. J. Eq. 170.

[5] Ryan *v.* Mockmath, note to Min-

to the court depends solely upon the necessity for getting in and cancelling an instrument without any allegation that it is the evidence of a void or voidable transaction, but simply on the ground that, for some reason or other, the instrument itself may be productive of annoyance or vexatious litigation.

A striking illustration of this may be found in the cases where forged instruments have been ordered to be given up; and where a deed has been directed to be cancelled, although it may have become a mere nullity, because it created a cloud upon a title.[1] The jurisdiction of courts of equity in cases of this kind is exercised *quia timet*, that is, because of a fear of future or contingent harm. The same principle applies to bills filed for other purposes, and has, indeed, given its name to this peculiar class of bills, which will be noticed hereafter.[2]

475. It is a familiar principle of equity that the application of the relief by rescission and cancellation rests in the sound discretion of the court; and that a chancellor may refuse to interfere for the purpose of setting a transaction aside, when he would at the same time decline to enforce its specific performance. Cancelling an executed conveyance is the exertion of a most extraordinary power in courts of equity, and when asked for on any ground it will not be granted unless the ground for its exercise most clearly appears.[3] Where no such ground exists the court will leave the parties to their common-law or statutory remedies.[4]

shaw *v.* Jordan, 3 Bro. C. R. 16, Brown's note; Hughes *v.* The United States, 4 Wal. 236; Metler *v.* Metler, 3 C. E. Green, 270; 4 Id. 457; Starr *v.* Ellis, 6 Johns. Ch. 393; Ferguson *v.* Fisk, 28 Conn. 501; and Wood *v.* Union Association, 63 Wis. 9. But an overdue note to which there is a perfect defence at law will not be directed to be given up and cancelled. Lewis *v.* Tobias, 10 Cal. 574; Shoup *v.* Cook, 1 Ind. 135; Dull's Appeal, 113 Pa. St. 515.

[1] Peake *v.* Highfield, 1 Russ. 559; Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 482; Cooke *v.* Cote, 2 Halst. Ch. 522, 427; Bunce *v.* Gallagher, 5 Blatchf. 481; Banks *v.* Evans, 10 Sm. & Marsh. 35; Lisle *v.* Liddle, 3 Anst. 649; Ryan *v.* Mockmath, 3 Bro. C. R. 15 (Brown's notes). See, also, Tucker *v.* Kenniston, 47 N. H. 267; Williams *v.* Fitzhugh, 37 N. Y. 444; Hamilton *v.* Cummings, 1 Johns. Ch. 521; Bushnell *v.* Harford, 4 Id. 301; Cornish *v.* Bryan, 2 Stock. 146; Martin *v.* Graves, 5 Allen, 661; Kennedy *v.* Kennedy, 7 Wright, (Pa.) 417; Stewart's Appeal, 28 P. F. Sm. 88.

[2] *Post*, Chap. IX.

[3] See Atlantic Delaine Co. *v.* James, 4 Otto, 207; Brainard *v.* Holsaple, 4 Greene, (Iowa) 485.

[4] See Beck *v.* Simmons, 7 Ala. 71; Watkins *v.* Collins, 11 Ohio, 31; Kirby *v.* Harrison, 2 Ohio, N. S. 326. See, also, Eckman *v.* Eckman, 5 P. F. Sm. 269; Edmond's Appeal, 9 Id. 220; Globe Mutual Life Ins. Co. *v.* Reals, 79 N. Y. 202, and *post*, § 575.

476. The remedies by specific performance, injunction, reformation and cancellation, would seem to embrace the whole circle of duties and obligations, and furnish appropriate redress for any violation of the same. There is, however, one case still remaining in which these remedies may possibly fail to furnish exact justice, and that is when the execution of a decree for specific performance or for an injunction has become impossible. In such a case the question arises: Is the complainant's bill to be dismissed? Or is any relief to be afforded him by way of compensation?

The tendency of courts of equity in this country is somewhat in favor of affording relief in proper cases by compensation; although there are decisions and opinions, entitled to great weight, in which a different view has been adopted.[1]

477. In England, prior to the statute 21 & 22 Vic., c. 27 (commonly known as Sir Hugh Cairns's Act), damages or compensation were decreed in favor of a complainant in equity only as incidental to other relief sought by the bill and actually granted, or where there was no adequate remedy at law, or where some peculiar equities intervened. By that statute it is in substance enacted that in cases of contracts, where the court has jurisdiction by way of injunction or specific performance, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured either in addition to or in substitution for such injunction or specific performance.[2]

There had, indeed, been some decisions in England in which the right of a court of equity to decree compensation for the injury sustained by the non-performance of a contract, in the event of the primary relief for a specific performance failing, had been recognised; and bills were not unfrequently filed in which such relief was prayed.[3] But the case of Denton *v.* Stewart,[4] in which that doctrine was promulgated, was subsequently overruled;[5] and the law was stated by Lord St. Leonards,

[1] See 3 Pars. on Cont., 403 (6th ed.).

[2] See Johnson *v.* Wyatt, 2 De G., J. & S. 18; Middleton *v.* Greenwood, Id. 142. Lord Cairns's act was repealed by Stat. 46 & 47 Vic. c. 49, but the saving clause of the repealing act preserves the jurisdiction to give damages. Such reservation, however, was not really necessary, for under the judicature acts damages can be given. Sayers *v.* Collyer, 28 Ch. D. 107.

[3] See the remarks of Vice-Chancellor Sir Richard Malins in Aberman Iron Works *v.* Wickens, L. R., 5 Eq. 505.

[4] 1 Cox, 258; 1 Ves. Jr. 329, n. See, also, Greenaway *v.* Adams, 12 Ves. 395; Gwillim *v.* Stone, 14 Ves. 128.

[5] Todd *v.* Gee, 17 Ves. 279.

in the last edition of his Treatise on Vendors and Purchasers, to be against the power of the court to award compensation in such cases, independently of the statute.[1]

478. On this side of the Atlantic the decisions have not been uniform; but, perhaps, their tendency is now rather in favor of the power of the court to decree compensation. The authority of Denton *v.* Stewart was recognised by Chancellor Kent in Phillips *v.* Thompson;[2] and although that distinguished jurist in later cases[3] refused to act upon this decision, yet there are several more recent authorities in favor of the power of courts of equity to award compensation.[4]

Thus in Masson's Appeal,[5] a decree was made for damages for the use of a party-wall, the bill having been originally filed for an injunction to restrain the use, and an injunction having become impossible in consequence of an actual user of the wall, after the institution of the suit, by agreement of the parties. And in Nagle *v.* Newton, although the compensation in that case was decreed as incidental to, and not as in substitution for other relief, the language of the court seems to approve of the exercise of the power by courts of equity to afford compensation as a distinct and independent relief.[6]

[1] Sug. V. and P. 233 (Vol. I., 350, 8th Am. ed.). See, also, Aberaman Iron Works *v.* Wickens, L. R., 5 Eq. 485; L. R., 4 Ch. 101. The decree of the Vice-Chancellor in this case was reversed, but upon the ground that the disappointed purchaser had a lien for the amount of the purchase-money; and the decision of the Court of Appeals is not, therefore, to be considered as an authority in favor of the doctrine that a bill would lie, in such a case, for compensation simply.

[2] 1 Johns. C. R. 150. See, also, Parkhurst *v.* Van Cortlandt, 1 Johns. C. R. 273.

[3] Hatch *v.* Cobb, 4 Johns. C. R. 559; Kempshall *v.* Stone, 5 Id. 193. See, also, Woodman *v.* Freeman, 25 Maine, 531.

[4] Andrews *v.* Brown, 3 Cush. 130; Jervis *v.* Smith, 1 Hoff. Ch. 470; Masson's Appeal, 20 P. F. Sm. 26; Nagle *v.* Newton, 22 Grat. 814; Oliver *v.* Croswell, 42 Ill. 41; Smith *v.* Kelley, 56 Maine, 64. See, also, Pratt *v.* Law, 9 Cranch, 494; Woodcock *v.* Bennet, 1 Cowen, 711, 756; Payne *v.* Graves, 5 Leigh, 561; Johnson *v.* Glancy, 4 Blackf. 94; Rockwell *v.* Lawrence, 2 Halst. Ch. 190; Aday *v.* Echols, 18 Alab. 353; Bowie *v.* Stonestreet, 6 Md. 418; Chambers *v.* Cannon, 62 Tex. 293.

[5] 20 P. F. Sm. 26; Milkman *v.* Ordway, 106 Mass. 253; Wonson *v.* Fenno, 129 Id. 405; Head *v.* Malony, 111 Pa. St. 102; Russell *v.* Farley, 15 Otto, 433.

[6] See opinion of Mr. Justice Christian in Nagle *v.* Newton, 22 Grat. 820. But where the entire ground for equitable relief fails, the bill cannot be retained to recover damages. Dakin *v.* Union Pac. Ry. Co., 5 Fed. Rep. 665.

Where an injunction is granted, the court will decree an account of the damages suffered as incidental to the main relief. This appears to be the settled rule both in England and in this country.[1]

CHAPTER IV.

ACCOUNT; PARTITION; DOWER; BOUNDARIES; RENT.

479. General nature of the right to an account.
480. Bills for Account.
481. Inadequacy of the common-law remedies.
482. Origin of the remedy in equity.
483. Limitations upon this remedy.
484. Extent of the remedy.
485. Plea of stated account.
486. Leave to surcharge and falsify.
487. Partition; origin of jurisdiction of chancery.
488. Disadvantages of proceeding at common law; changes by statute in the United States.
489. Advantages of mode of procedure in equity.
490. Mode of making partition in equity.
491. Difficulties of making partition no objection to a decree.
492. Power to award owelty.
493. Power to order a sale.
494. Nature of Dower
495. Remedy by bill in equity.
496. Disadvantages of the proceeding at common law.
497. Advantages of the procedure in equity.
498. Account of mesne profits.
499. Multiplicity of suits avoided.
500. Dower out of equitable estates.
501. General conclusions as to equitable jurisdiction.
502. Manner of assigning dower.
503. Jurisdiction of equity in cases of Confusion of Boundaries.
504. In cases of Rent.

479. THE equitable remedy of Account is applied whenever it is required, as a matter of course, in all cases in which equitable titles are to be protected, and equitable rights enforced; and, also, in many instances where jurisdiction has been assumed by virtue of equitable remedies. Thus, if a trustee violates his duty by making a profit at the expense of the trust estate, it is part of the relief to which the *cestui que trust* is entitled, and, therefore, part of the redress which a court of equity affords, that the trustee shall *account* for the profits thus impro-

[1] Thomas *v.* Oakley, 18 Ves. 184; Coleman's Appeal, 25 Id. 441; Allison & Evans's Appeal, 27 Id. 227. Souder's Appeal, 7 P. F. Sm. 498;

perly made to the injury of the equitable title. So, if a conveyance tainted with fraud is sought to be set aside, it may be necessary, for a complete vindication of the equitable right which the complainant seeks to enforce, that the defendant should *account* for the rents and profits of the property which he has been fraudulently enjoying; and this account will be accordingly ordered as part of the relief required for the protection of the complainant's equity. The cases, already noticed, in which, in bills for injunctions, an account will be decreed, are illustrations of the mode in which this particular form of relief is applied in conjunction with other equitable remedies.

In all of the above instances the *account* plays, as it were, a subordinate part, and is used more effectually to work out equities which form the basis of the bill.

480. But there are other cases, and it is with these that we have now to do, in which the jurisdiction of courts of chancery is based solely upon the remedy of account, and in which without the necessity for this remedy the case would present no features to warrant the interposition of the chancellor. Bills filed in such cases are, in the true technical sense, bills for account, and in them the remedy itself invokes or gives rise to the jurisdiction, whereas in the instances already put, the jurisdiction already attached, invokes or makes use of the remedy.

481. Bills for account took their rise from the inadequacy of the common-law actions.

The only forms of action which were at all applicable to cases of account were assumpsit and account-render.

The former lay for the balance of an account. If this balance was admitted, of course there was no difficulty; but if the balance was disputed, and it became necessary, in order to ascertain it, that the accounts between the parties should be gone over item by item, it was entirely out of the power of a jury to accomplish such a task, and the remedy accordingly failed.

The action of account-render was more effective, but labored under several disadvantages. After the preliminary judgment, *quod computet*, the account was referred to auditors, who could indeed go over it item by item, but who had not originally the power of examining parties, although this power was subsequently conferred upon them by statute.[1] In respect to contro

[1] 3 & 4 Anne, c. 16.

verted items the auditors had no power of passing upon them at once, so as to carry on a continuous investigation, but were obliged to refer each disputed item to the court or a jury as a distinct issue of law or fact;[1] and if, after the investigation had been made and the account taken, it was found that the balance was against the plaintiff, no judgment therefor could be entered, and no payment could be enforced.[2]

Moreover, the remedy itself was applicable to a few cases only. By the rules of the common law none could be charged in account-render but guardians in socage, bailiffs or receivers, except that, in favor of merchants and for the advancement of trade, a person naming himself as merchant might have an action against another naming him merchant and charging him as his receiver. But the action did not lie between the executors and administrators of the parties; although it was subsequently extended to them by several statutes.[3]

482. These disadvantages of the common-law remedies very naturally led to a resort to courts of equity, and bills for account consequently came to constitute a well-established head of equitable jurisdiction.[4] In such bills a foundation is first laid for all necessary inquiries by the discovery elicited from the defendant's answer. The cause is then referred to a master, before whom the account is taken, who has the power to examine parties under oath, who can compel the production of books and documents, and by whom all the items can be passed upon, subject to a revision by the court upon the coming in of his report.[5]

483. It must not be supposed, however, that a court of chancery can draw to itself every transaction between individuals in which an account between parties is to be adjusted. Its juris-

[1] This deficiency in the common-law action is now remedied in some States by statute; such is the case (for example) in Pennsylvania and Massachusetts. In England, the Common Law Procedure Act of 1854 has not affected the jurisdiction of the court of chancery upon this subject. Croskey *v.* European and American Steam Shipping Co., 1 Johns. & H. 108; Shepard *v.* Brown, 4 Giff. 208.

[2] Spence Eq. 649.

[3] 13 Edw. I., st. 1, c. 23; 25 Edw. III. st. 5, c. 5; 38 Edw. I., st. 1, c. 11; 3 & 4 Anne, c. 16.

[4] See Long *v.* Majestre, 1 Johns. Ch. 305; Dubourg de St. Colombe's Heirs *v.* United States, 7 Peters, 625; Hickman *v.* Stout, 2 Leigh, 6; Power *v.* Reeder, 9 Dana, 6; Hay *v.* Marshall, 3 Hump. 623; Kirkman *v.* Vanlier, 7 Alab. 217.

[5] Adams's Doct. of Equity, 225.

diction is limited by certain restrictions. A court of equity cannot take cognisance of every action for goods, wares or merchandise sold and delivered, or of money advanced, where partial payments have been made, or of every contract, express or implied, consisting of various items, in which different sums of money have become due, and different payments have been made.[1]

Again, a naked right of set-off will not be a sufficient ground for a bill for an account. The nature of a set-off has been already explained, and it will be sufficient to refer to the explanation there given.[2]

Now, this right is entirely different from the right to an account, where the demands are not of a distinct and independent character, but are connected in such a way that the whole series forms one transaction.[3]

It has, however, been pointed out in a former chapter that courts of equity will entertain jurisdiction in certain cases of set-off. Bills in such cases bear some small resemblance to bills for an account, but they should not be confounded with the technical bill for an account. Where the receipts or payments, or both, are all on one side, a bill for an account will not lie.[4] Nor will a bill for an account lie against a disseisor or other wrongdoer.[5]

484. While the jurisdiction of courts of chancery in matters of account is limited by the considerations above stated, and perhaps by others, it is, nevertheless, difficult to draw the line with absolute precision.[6] It may, however, be affirmed that in all cases in which an action of account would be a proper remedy at law, the jurisdiction of a court of equity is undoubted;[7] and that this jurisdiction will extend, moreover, to

[1] Fowle *v.* Lawrason, 5 Peters, 502; Nesbit *v.* St. Patrick's Church, 1 Stockt. 76. See, also, Avery *v.* Ware, 58 Alab. 475; Robinson *v.* Bullock, Id. 618.

[2] *Ante*, § 327, and note.

[3] See Ranger *v.* Great Western Railway Co., 5 H. L. Cas. 91.

[4] Passyunk Building Association's Appeal, 2 Norris, 441; Bank of U. S. *v.* Biddle, 2 Parsons, 54; Grubb's Appeal, 9 Norris, 228; 1 Story's Equity, §§ 458-9.

[5] Frisbie's Appeal, 7 Norris, 146, and cases cited.

[6] Fowle *v.* Lawrason, 5 Pet. 495; Seymour *v.* Dock Co., 5 C. E. Green, 407.

[7] Fowle *v.* Lawrason, 5 Pet. 495; Mitchell *v.* Manufac. Co., 2 Story, 648; Post *v.* Kimberly, 9 Johns. 470; Jones

all cases of mutual accounts, and also to cases in which the accounts are all on one side, but are very complicated and intricate,[1] although such accounts would not be cognisable in the common-law action, as not existing between those parties by and against whom account render will lie.

In short, the jurisdiction of the chancellor covered all cases for which account render would lie, besides many to which that action did not extend.

The jurisdiction in equity depending not so much on the absence of the common-law remedy as upon its inadequacy, its exercise is a matter in the discretion of the court; in other words, the court will take upon itself to say whether the common-law remedy is, under the circumstances of the case, and in view of the conduct of the parties, sufficient for the purposes of justice, or whether the interference of the court of chancery may be properly called for and beneficially applied.[2]

Moreover, where there is a duty to render an account, *e. g.*, on the part of an agent or steward, and discovery is required, a bill will lie.[3]

A bill in equity will not ordinarily lie on behalf of an agent against his principal, where the ground for invoking the jurisdiction is *discovery*, for it is the duty of the agent, and not that of the principal, to keep the accounts.[4] But where the accounts are mutual, or complicated, or where the nature of the employment (as, for example, that of a steward) is such that money is often paid in confidence without vouchers, such a bill will lie.[5]

v. Bullock, 2 Dev. Ch. 368; Nelson *v.* Allen, 1 Yerg. 360; Bruce *v.* Burdet, 1 J. J. Marsh. 80; Wilson *v.* Mallett, 4 Sand. S. C. 112.

[1] Thorne *v.* Towanda Towing Co., 15 Fed. Rep. 289; O'Connor *v.* Spaight, 1 Sch. & Lef. 305.

[2] See Bierbower's Appeal, 107 Pa. St. 17; North Eastern Railroad Co. *v.* Martin, 5 Phillips, 758; South Eastern Rd. *v.* Brogden, 3 MacN. & G. 23; Foley *v.* Hill, 2 H. L. Cas. 28; Anderson *v.* Noble, 1 Drew. 143; Bliss *v.* Smith, 34 Beav. 508; Pike *v.* Dickinson, L. R., 7 Ch. 61; and Great Western Ins. Co. *v.* Cunliffe, 9 Id. 525. See, also, Miller *v.* Kent, 16 Fed. Rep. 13; and Gaines *v.* The City of New Orleans, 17 Id. 16—particularly the latter case, for a full discussion of the general subject.

[3] Appeal of Clarke et al., 107 Pa. St. 436; Adams's Doctrine of Equity, 221.

[4] Wilson *v.* Mallett, 4 Sanf. S. C. 112; Smith *v.* Leveaux, 2 De G., J. & Sm. 1; Dinwiddle *v.* Bailey, 6 Ves. 136; Lynch *v.* Willard, 6 Johns. Ch. 342.

[5] See Smith *v.* Leveaux, 2 De G., J. &

The prevention of a multiplicity of suits, or the necessity for discovery will sustain a bill for an account;[1] although it has been recently held that the bill depends rather upon the existence of a fiduciary relation, than on the need of discovery.[2]

485. It has been already observed that where an account has been settled between the parties, and a balance struck, the remedy by a common-law action is entirely adequate, and there is, therefore, no occasion for the exercise of the equitable remedy. It necessarily follows that a plea of stated account will be a bar to a bill for an account. The plea is good as to discovery as well as to relief. In referring such a case to a master it is usual to direct that if he finds any account stated he shall not disturb it.[3]

What will constitute a stated account is sometimes a difficult question, and depends, as a general rule, upon the circumstances of the particular case. It is not necessary that the account, alleged to be a stated account, should be signed by the parties. Acquiescence may be proved by other evidence; and sometimes is presumed from conduct. Keeping an account for a length of time without objection, may justify a presumption of acquiescence.[4] But such delay is only one of many elements to be taken into consideration; and the presumption to which it gives rise is liable to be rebutted.[5]

486. A stated account may be re-opened for fraud, or for error in particular items. In such cases the court will sometimes

Sm. 1; Dinwiddie *v.* Bailey, 6 Ves. 136; Allison *v.* Herring, 9 Sim. 583; Ludlow *v.* Simond, 2 C. C. E. 1, 39, 53; Kerr *v.* The Steamboat Co., 1 Cheves, (2d part), 189.

[1] See Armstrong *v.* Gilchrist, 2 Johns. Ch. 424; Rathbone *v.* Warren, 10 Johns. 587; King *v.* Baldwin, 17 Id. 384; Story's Eq., § 456; Daniel's Ch. Prac. 576.

[2] Marvin *v.* Brooks, 94 N. Y. 71.

[3] Weed *v.* Small, 7 Paige, 573; Bullock *v.* Boyd, 4 Edw. Ch. 293; Dial's Ex'rs. *v.* Rogers, 4 Dessaus. 175; Adams's Doct. of Eq. 226.

[4] Daniel's Chan. Prac. 670; Irvine *v.* Young, 1 Sim. & Stu. 333; Willis *v.* Jernegan, 2 Atk. 251; Sherman *v.* Sherman, 2 Vern. 276; Tickel *v.* Short, 2 Ves., Sr., 239; Thompson *v.* Fisher, 1 Harris, (Pa.) 313; Porter *v.* Patterson, 3 Id. 229; Beers *v.* Reynolds, 12 Barb. 288, Dows *v.* Durfee, 10 Id. 213; Coopwood *v.* Bolton, 26 Miss. 212; Brown *v.* Vandyke, 4 Halst. Ch. 795; Ogden *v.* Astor, 4 Sand. S. C. 311; Lupton *v.* Janey, 13 Peters, 381.

[5] See Williams *v.* Savage Manufac. Co., 1 Md. Ch. 306.

direct the whole account to be re-opened;[1] in other cases, the complainant will be granted leave to surcharge and falsify.[2]

To surcharge is to show that a proper credit has been omitted; to falsify is to show that an improper charge has been inserted.[3] For the purpose of surcharging or falsifying an account, the erroneous items must be specified in the pleadings. Hence, where there is a mere bill for an account, in which no specific errors are pointed out, and a plea of a stated account is put in, the complainant must amend his bill, and charge either fraud or particular errors. If, however, the bill in the first instance points out particular errors, these must be denied by averments in the plea, as well as by answer in support of the plea.[4]

In this country the account can only be opened in the items specifically pointed out;[5] but in England the doctrine has been pushed to the extent of holding that where an account has been surcharged and falsified in one or more items, the complainants can then go on and surcharge and falsify it at large.

A bill to impeach an account must be filed in a reasonable time.[6]

487. The jurisdiction of courts of chancery in cases of Partition owes its origin to the inadequacy of the remedies which the common law afforded to joint owners who were desirous of

[1] See Bankhead *v.* Alloway, 6 Cold. 56.

[2] Slee *v.* Bloom, 5 Johns. Ch. 366; 20 Johns. 669; Barrow *v.* Rhinelander, 1 Johns. Ch. 550; Johnson's Ex'rs. *v.* Ketchum, 3 Green, Ch. 364; Botifeur *v.* Weyman, 1 McCord Ch. 156; Lee's Adm'rs. *v.* Reed, 4 Dana, 109; Roberts *v.* Totten, 8 Eng. 609.

[3] Pit *v.* Cholmondeley, 2 Ves. Sr. 565.

[4] Daniel's Chan. Prac. 374, 691.

[5] See Chappedelaine *v.* Decheneaux, 4 Cranch, 306; Consequa *v.* Fanning, 3 Johns. Ch. 587; Nourse *v.* Prime, 7 Id. 69; Phillips *v.* Belden, 2 Edw. Ch. 1; Troup *v.* Haight, Hopk. Ch. 539; Bullock *v.* Boyd, 1 Hoff. Ch. 294; Redman *v.* Green, 3 Ired. Eq. 54; Gover *v.* Hall, 3 Har. & J. 43; Lilly *v.* Kroesen, 3 Maryl. Ch. 83; Williams *v.* The Savage Manufac. Co., 1 Id. 306; Freeland *v.* Cocke, 3 Munf. 352; Compton *v.* Greer, 2 Dev. Ch. 93.

[6] Lupton *v.* Janey, 13 Peters, 381; Baker *v.* Biddle, Baldwin C. C. R. 418; Ellison *v.* Moffat, 1 Johns. Ch. 46; Moers *v.* White, 6 Id. 360, 370; Dexter *v.* Arnold, 2 Sumner, 108; Bolling *v.* Bolling, 5 Munf. 334; Randolph *v.* Randolph, 2 Call, 537; Gregory's Ex'rs. *v.* Forrester, 1 McCord Ch. 318; Ex'rs of Radcliffe *v.* Wightman, Id. 408; Hutchins *v.* Hope, 7 Gill. 119; Chesson *v.* Chesson, 8 Ired. Eq. 141. See, also, Botifeur *v.* Weyman, 1 McCord Ch. 156; Ogden *v.* Astor, 4 Sandf. S. C. 311.

severing the joint ownership. This jurisdiction was assumed some time about the reign of Elizabeth;[1] and became so well established both in England and in the United States, that to invoke this equitable remedy has become a matter of right and not of mere grace.[2]

It is well known that at common law the writ of partition existed only where the joint ownership arose by operation of the law; and was therefore confined to the single case of tenancy in co-parcenary. As the law created that tenancy, it was thought reasonable that the law should also furnish the means for its severance. By statutes of 31 Henry VIII., c. 1, and 32 Id. c. 32, the remedy was extended to the cases of joint tenants and tenants in common. The partition of copyhold lands was effected by a plaint in the Lord's Court in the nature of a writ of partition.[3]

488. The principal disadvantages of the common-law action were two. In the first place, only the parties in possession could be bound by the judgment, and consequently estates in remainder or contingency were not and could not be affected thereby. In the second place, as the judgment was for a division according to the titles proved, it was incumbent upon the complainant to prove the defendants' titles as well as his own, which was usually difficult, and sometimes impossible, to do. Moreover, the judgment of a common-law court could not be conveniently moulded to meet the exigencies of each particular case.

In consequence of these disadvantages, and of the superiority of the equitable remedy, the writ of partition and the plaint were abolished by statute.[4]

[1] 1 Spence Eq. 654.

[2] See Baring *v.* Nash, 1 V. & B. 552; Parker *v.* Gerard, Amb. 236; Wood *v.* Little, 35 Maine, 107; Hanson *v.* Willard, 12 Id. 142; Bailey *v.* Sisson, 1 R. Island, 233; Wiseley *v.* Findlay, 3 Rand. 361; Castleman *v.* Veitch, Id. 598; Otley *v.* McAlpine's Heirs, 2 Grat. 340; Allen *v.* Barkley, 1 Speer Eq. 264; Oldhams *v.* Jones, 5 B. Mon. 458; Holmes *v.* Holmes, 2 Jon. Eq. 334; Wright *v.* Marsh, 2 Greene, (Iowa) 94; Howey *v.* Goings, 13 Ill. 95; Donnell *v.* Mateer, 7 Ired. Eq. 94. But in Georgia it would seem that a bill for partition in equity will be entertained only when some peculiar circumstances exist which render the common-law remedy inadequate; Boggs *v.* Chambers, 9 Georgia, 1; Rutherford *v.* Jones, 14 Id. 521.

[3] Adams's Doct. Eq. 229, 230.

[4] 3 & 4 Will. IV., c. 27, § 36.

In nearly all of the United States the partition of real property is the subject of express statutory enactments. In some States the remedy is by petition, the common-law writ, in many of them, existing concurrently.[1] In others, the common-law action has been freed from its disadvantages, and rendered more effective and available.[2] Partition of decedents' estates is also effected in some States by probate courts and similar tribunals. In many of the States, however, the remedy by bill in equity also prevails, and from its many advantages must continue to be a favorite method of effecting a division of real property between joint-owners.

489. For in equity the disadvantages which were attendant upon the common-law action do not exist.[3] Persons who have limited estates may become parties to a bill for partition, and the estates of such parties only may be divided; or, if it is deemed desirable, the parties in remainder or reversion may be brought in, and the decree will then be binding upon them, and the whole estate may be divided.[4] Interests of infants or persons not *in esse* may also be bound.[5]

[1] See 1 Wash. on Real Prop. 433.

[2] See Smith *v.* Smith, 10 Paige, 470.

[3] The advantages of an equitable partition are summed up by Chancellor Zabriskie in Hall *v.* Piddock, 6 C. E. Green, 314, in the following language; "The peculiarities of an equitable partition are, that such part of the land as may be more advantageous to any party on account of its proximity to his other land, or for any other reason, will be directed to be set off to him if it can be done without injury to the others; that when the lands are in several parcels, each joint owner is not entitled to a share of each parcel, but only to his equal share in the whole; that where a partition exactly equal cannot be made without injury, a gross sum or yearly rent may be directed to be paid for owelty or equality of partition by one whose share is too large to others whose shares are too small; and that when one joint-owner has put improvements on the property, he shall receive compensation for his improvements, either by having the part on which the improvements are assigned to him at the value of the land without the improvements, or by compensation directed to be made for them." In this case an injunction was granted in a bill for partition in equity to restrain similar proceedings at law, which had been previously instituted, solely on the ground of the superiority of the equitable over the common-law method as a means of effecting a just division among the parties. See, also, Donnel *v.* Mateer, 7 Ired. Eq. 94.

[4] Gaskell *v.* Gaskell, 6 Sim. 643; notes to Agar *v.* Fairfax, 2 L. Cas. Eq. 468 (4th Eng. ed.). Duke *v.* Hague, 11 Out. 67.

[5] Wills *v.* Slade, 6 Ves. 498; Gaskell *v.* Gaskell, 6 Sim. 643.

In proceedings for partition in equity it is not necessary that the complainant should set forth the defendant's title. Indeed, discovery as to this title is frequently a part of the relief which the complainant desires, and to which he is entitled, and if necessary, the reference to the master will direct that the defendant's title be ascertained.[1] The complainant, however, must show his own title; otherwise the bill will be dismissed.[2] And he must show that the connection between his title and that of the defendant is such as to entitle him to a partition as against the latter.[3] A bill for a partition cannot be made the means of trying a disputed title;[4] although it seems that a question as to title may be decided by the court with the consent of the parties.[5] Unless the title is undisputed, the bill must be dismissed, or else retained until the title has been settled at law.[6] But this rule applies only to disputes as to legal titles; and where the dispute involves an equitable element, the court has jurisdiction over the whole matter.[7]

Partition may be had of an equitable estate;[8] or of an incorporeal hereditament.[9]

All persons entitled to, or claiming an interest in the land, whether legal or equitable, are proper parties to a bill for parti-

[1] Jope *v.* Morsehead, 6 Beav. 213; Agar *v.* Fairfax, 17 Ves. 533.

[2] Parker *v.* Gerard, Amb. 236; Jope *v.* Morsehead, 6 Beav. 213.

[3] Ramsay *v.* Bell, 3 Ired. Eq. 209.

[4] Slade *v.* Barlow, L. R., 7 Eq. 296; Potter *v.* Waller, 3 De G. & Sm. 410; Giffard *v.* Williams, L. R., 5 Ch. 546; Bolton *v.* Bolton, L. R., 7 Eq. 298, n.

[5] Burt *v.* Hellyar, L. R., 14 Eq. 160;

[6] Castleman *v.* Veitch, 3 Rand. 598; Sraughan *v.* Wright, 4 Id. 493; Smith *v.* Smith, 10 Paige, 470; Steedman *v.* Weeks, 2 Strob. Eq. 145; Albergottie *v.* Chaplin, 10 Rich. Eq. 428; Pell *v.* Ball, 1 Id. 361; Collins *v.* Dickinson, 1 Hay, 240; Davis *v.* Davis, 2 Ired. Ch. 607; Wilkin *v.* Wilkin, 1 Johns. Ch. 111; Manners *v.* Manners, 1 Green Ch. 384; Garrett *v.* White, 3 Ired. Ch. 131; Bruton *v.* Rutland, 3 Humph. 435; Foust *v.* Moorman, 2 Carter, 17; Boone *v.* Boone, 3 Maryl. Ch. 497; Corbitt *v.* Corbitt, 1 Jones Eq. 114; Walker *v.* Laflin, 26 Ill. 472; Williams *v.* Wiggard, 53 Id. 233; Gourley *v.* Woodbury, 43 Verm. 89; Hassam *v.* Day, 39 Miss. 392; Dewitt *v.* Ackerman, 2 C. E. Green, 215; but see Cuyler *v.* Ferrill, 1 Abb. (U. S.) 169; Morenhout *v.* Higuera, 32 Cal. 289; Bollo *v.* Navarro, 33 Id. 459; Adams's Doct. Eq. 458, note (6th Am. ed.).

[7] Donnell *v.* Mateer, 7 Ired. Eq. 94; Foust *v.* Moorman, 2 Carter, 17; Carter *v.* Taylor, 3 Head, 30; Leverton *v.* Waters, 7 Cold. 20; Longwell *v.* Bentley, 11 Harris, (Pa.) 99; Obert *v.* Obert, 2 Stockt. (Ch.) 98.

[8] Hitchcock *v.* Skinner, 1 Hoff. Ch. 21.

[9] Bailey *v.* Sisson, 1 R. Island, 233.

tion. It is only, however, by a person entitled in possession that a bill for partition can be filed; although, as was stated above, the owners of expectant estates may be made parties, and their interests will be bound. Therefore, a bill cannot be maintained by a joint tenant, or tenant in common, in remainder or reversion. Nor can he, after he has filed his bill, put himself in a better position, by acquiring a title in possession and amending his bill.[1]

The owners of an estate subject to a mortgage may have partition in equity; in which case the equity of redemption only is divided.[2]

Judgment-creditors and mortgagees of tenants in common are not proper parties to a bill for partition;[3] although it has been decided in England that a mortgagee of an undivided share *may* maintain a bill for foreclosure and partition.[4] Where the defendants are desirous that there shall be no partition of their several shares, the partition may be confined to the aliquot share of the complainant.[5]

490. The method of making a partition in equity is by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required. If the proportions to which the different parties are entitled appear upon the pleadings, no reference to a master to ascertain them is necessary; otherwise, such a reference will be ordered.[6] The interlocutory decree directing such inquiries generally goes on to order a partition to take place.[7] After the return of the commission, and the confirmation thereof by the court, the partition is finally completed by mutual conveyances of the allotments made to the several parties.[8] Sometimes, instead of

[1] Evans *v.* Bagshaw, L. R., 8 Eq. 469; L. R., 5 Ch. 340.

[2] Wotton *v.* Copeland, 7 Johns. Ch. 140.

[3] Sebring *v.* Mersereau, 9 Cowen, 344; Harwood *v.* Kirby, 1 Paige, 469; Low *v.* Holmes, 2 C. E. Green, 148; Speer *v.* Speer, 1 McCart. 240; Thruston *v.* Minke, 32 Maryl. 571; Long's Appeal, 27 P. F. Sm. 151. Though a mortgagee may be joined when it is necessary for the protection of his interests; Whitton *v.* Whitton, 38 N. Hamp. 135.

[4] Fall *v.* Elkins, 9 Week. Rep. 861. See Watkins *v.* Williams, 3 MacN. & G. 622.

[5] Hobson *v.* Sherwood, 4 Beav. 184.

[6] Daniel's Chan. Prac. 1121.

[7] Id. 1123.

[8] Id. 1122.

ordering a commission, the court may make a declaration that the estate ought to be divided, with liberty to the parties interested therein to bring before the judge at chambers proposals for a partition.[1]

In England, the court, in some cases, instead of directing conveyances of the several shares, has declared each of the parties trustees as to the shares allotted to the others of them, and then vested the whole trust estate in a single new trustee, under the Trustee Act, with directions to convey to the several parties their allotted shares.[2] Under the same act, an infant may be declared trustee of such portions of the property as were allotted to the other parties. Before that act, where the legal estate to a portion was vested in an infant, the conveyances were respited until he came of age, and a day given to him to show cause against the decree.[3] In some of the United States, the decree has, either by statute or by judicial decision, the effect of vesting the titles of the different purparts in the persons respectively entitled thereto, without the necessity of a conveyance.[4]

491. The inconvenience or difficulty of making the partition is no objection to a decree. Thus, a single house may be ordered to be divided; and in one case, at least, this division is said to have been actually effected by building up a wall in the middle of the house.[5] It need scarcely be said, however, that the court will, as a general rule, make such a partition as will best preserve the value of the property; and that such an extreme measure as the actual division of a house would not be resorted to, if a fair partition could be made in any other way.[6] Thus, if there were three houses to be divided among three, it would not be right to divide every house, for that would be to spoil every house; but some recompense is to be made either by sum of money, or rent for owelty of partition, to those who have the houses of less value.[7] Moreover, in dividing real estate the con-

[1] Clarke *v.* Clayton, 2 Giff. 333.

[2] Shepherd *v.* Churchill, 25 Beav. 21.

[3] House *v.* Falconer, 4 Dessaus. 86; notes to Agar *v.* Fairfax, 2 Lead. Cas. Eq. 474 (4th Eng. ed.).

[4] See Griffith *v.* Phillips, 3 Grant's Cas. 381.

[5] Turner *v.* Morgan, 8 Ves. 143; notes to Agar *v.* Fairfax, 2 Lead. Cas. Eq. 470 (4th Eng. ed.). See also Wood *v.* Little, 35 Maine, 107; Scoville *v.* Kennedy, 14 Conn. 339; Smith *v* Smith, 10 Paige, 470.

[6] Daniel's Chan. Prac. 1130.

[7] See Earl of Clarendon *v.* Hornby, 1 P. Wms. 446.

venience of the different parties in interest should be consulted. Thus, if one of the parties has property to which one of the allotments is contiguous, and there is another allotment not contiguous, that would be a good ground, *cæteris paribus*, for allotting that particular portion to the individual to whom it is much more convenient to have it than the other.[1] A mill or an advowson may be divided by giving to the parties every alternate toll-dish or turn of the church, as is done in the common-law writ.[2]

492. Courts of equity have power to award owelty in partition, which is a sum of money or a rent given for the purpose of equalizing the shares.[3] For the same purpose one purpart may be charged with a servitude or easement for the benefit of another.[4] This owelty could not have been granted in the common-law writ, although statutes in some States now authorize it in such actions. Besides awarding owelty, a court of chancery will do complete justice between the parties by ordering an account where one joint owner appears to have received more than his share of the rents and profits;[5] and, in proper cases, by decreeing an allowance for money expended in improvements.[6]

493. One disadvantage under which proceedings for partition in equity labored, was the want of power in the court to order a sale of the property.[7] It is true that a sale might have been

[1] Canning *v.* Canning, 2 Drew. 436; Hall *v.* Piddock, 6 C. E. Green, 314.

[2] Dan. Ch. Prac. 1131.

[3] Smith *v.* Smith, 10 Paige, 470; Phelps *v.* Green, 3 Johns. Ch. 302; Graydon *v.* Graydon, 1 McMul. Eq. 63; Haywood *v.* Judson, 4 Barb. S. C. 228; Warfield *v.* Warfield, 5 Har. & J. 459; Wynne *v.* Tunstall, 1 Dev. Ch. 23; Cox *v.* McMullin, 14 Grat. 82; Norwood *v.* Norwood, 4 Har. & J. 112.

[4] Cheswell *v.* Chapman, 38 N. Hamp. 17.

[5] Rozier *v.* Griffith, 31 Missouri, 171; Leach *v.* Beattie, 33 Verm. 195; Early *v.* Friend, 16 Grat. 21; Hitchcock *v.* Skinner, 1 Hoff. Ch. 21; Backler *v.* Farrow, 2 Hill. Ch. 111; Carter *v.* Garter 5 Munf. 108.

[6] Swan *v.* Swan, 8 Price, 518; Town *v.* Needham, 3 Paige, 553; St. Felix *v.* Rankin, 3 Edw. Ch. 323; Conklin *v.* Conklin, 3 Sandf. Ch. 64; Green *v.* Putnam, 1 Barb. S. C. 500; Brookfield *v.* Williams, 1 Green's Ch. 341; Obert *v.* Obert, 1 Halst. Ch. 397; Doughady *v.* Crowell, 3 Stockt. 201; Hall *v.* Piddock, 6 C. E. Green, 314; Respass *v.* Breckenridge, 2 A. K. Marsh. 581; Louvalle *v.* Menard, 1 Gilm. 39; Sneed *v.* Atherton, 6 Dana, 276; Borah *v.* Archers, 7 Id. 176; Dean *v.* O'Meara, 47 Ill. 120.

[7] It may be remarked in this connection that it has recently been held in England that the court has no jurisdiction to decree a sale of personal chattels, held in strict settlement, sim-

ordered if all the parties who were *sui juris* desired it; and this, although some of the parties were infants, provided it appeared that it would be advantageous for the infant that a sale should take place. But if one of the parties *sui juris* objected, no sale could take place. This difficulty was, in England, obviated by a statute passed in 1868, by which a very useful power was conferred upon the court to order sales in certain cases.[1]

In most of the United States, the courts of equity have power to order a sale in partition.[2] Specific performance of an *agreement* to divide real estate will be enforced in chancery; and this was so as to copyhold lands even prior to the passage of the statute extending the chancery jurisdiction in partition to estates of that tenure.[3]

494. Dower is the right of a married woman to have assigned to her, after the death of her husband, one-third of the land of which he was seised in fee-simple or fee-tail at any time during coverture, and which his issue, if any, might have inherited; and to enjoy the land thus assigned to her for life.

This right accrues immediately upon the death of the husband; but the widow cannot enter upon any specific part of the real estate until the dower has been assigned.[4] It is the duty of the heir to make the assignment of dower. No writing for this purpose was necessary; a parol assignment, if accepted by the widow, was good.

495. In case the heir neglected or refused to assign the dower, the widow had her remedy at common law, by the writ of right

ply on the ground that it would be for the benefit of all parties interested; D'Eyncourt *v.* Gregory, L. R., 3 Ch. D. 635.

[1] 31 & 32 Vic., c. 40. See notes to Agar *v.* Fairfax, 2 Lead. Cas. Eq. 477 (4th Eng. ed.).

[2] See American note to Agar *v.* Fairfax, 2 Lead. Cas. Eq. 915 (4th Am. ed.).

[3] See 2 Lead. Cas. Eq. 468 (4th Eng. ed.).

[4] In some of the United States the widow has the right, by statute, to hold and enjoy the mansion-house until her dower is assigned to her. It will be remembered, also, that by Magna Charta the widow had a right to remain in the mansion-house for forty days after her husband's death. This was called the widow's quarantine. Similar provisions in favor of the widow are found in the statute books of most of the States. See 4 Kent's Com. 62.

of dower, and by the writ of dower *unde nihil habet*;[1] but in addition to these, the remedy by bill in equity was invoked at a very early period. The first exercise of this jurisdiction of the chancellor to assign dower appears to have occurred in the reign of Elizabeth; but for many years the reported cases were not numerous, and there seems to have been much doubt as to the grounds upon which this jurisdiction was assumed.[2] The relief was at one time considered to be of an auxiliary character. Thus, as the title papers of an estate were in the hands of the heir, it was frequently necessary for the widow to have access to them, or, at all events, to be informed of their contents, in order to a full knowledge of her rights. This end was accomplished by a bill of discovery, which was entertained for the purpose of enabling the widow subsequently to assert her right at law. Bills were also entertained for the purpose of removing impediments in the way of the wife's legal action; and the jurisdiction thus acquired was, upon the familiar principles of equity, extended to afford complete relief.[3] The jurisdiction, however, was not assumed without hesitation; and in two early cases the bills were dismissed because there was no impediment in the way of the complainant's proceeding at law.[4] The scruples against exercising this jurisdiction were, however, eventually overcome in consequence of the many excellent reasons which existed in its favor. These reasons were the disadvantages under which the common-law remedies labored—the fact that in some cases the right to dower was recognised solely in courts of equity, and the prevention of multiplicity of suits.

Such reasons for the exercise of chancery jurisdiction in cases of dower existed in this country as well as in England; and we accordingly find the courts in the United States entertaining bills for dower at an early date.[5] It was, indeed, at one time doubted in New Jersey whether the common-law courts did not

[1] The common law action in a large number of the United States answers most nearly to this writ. 4 Kent's Com. 70.

[2] 2 Scrib. on Dower, 134.

[3] Id.

[4] Shute *v.* Shute, Prec. Ch. 111; Wallis *v.* Everard, 3 Ch. Rep. 161; 2 Scribner on Dower, 135.

[5] Herbert *v.* Wren, 7 Cranch, 370; Hazen *v.* Thurber, 4 Johns. Ch. 604; Swaine *v.* Perine, 5 Id. 482; Jones *v.* Powell, 6 Id. 194; Badgley *v.* Bruce, 4 Paige, 98; 2 Scrib. on Dower 142.

possess exclusive jurisdiction upon the subject of dower;[1] but this doubt has now been settled in favor of the court of chancery, and the concurrent jurisdiction of that tribunal with the common-law courts fully established.[2]

Indeed, it may be said in the language of Chancellor Kent, that "the jurisdiction of chancery over the claim of dower has been thoroughly examined, clearly asserted, and definitely established."[3]

496. The disadvantages of the common-law procedure were numerous. In addition to the circumstances that no discovery could be had and no account taken, there was, moreover, the inability to recover damages, a defect which enabled the heir, by refusing to assign dower, to enjoy all the mesne profits until judgment was actually recovered by the widow.[4] This defect, indeed, was remedied, so far as the writ of dower *unde nihil habet* was concerned, by the statute of Merton,[5] by which it was provided that the heir should yield damages from the death of the husband to the date of the judgment. But this statute did not apply to the writ of right of dower; and even the writ of dower *unde nihil habet* did not furnish relief in all cases, because, by the language of the statute, recovery could only be had where the husband died seised.[6] If, therefore, the husband had aliened, during his lifetime, no damages could be recovered against his alienee.[7]

497. In equity, as has been already stated, discovery could be had of all things which were necessary to ascertain the widow's right of dower and the extent thereof; and, moreover, if any difficulty or impediment existed in the way of the assertion of her legal right, the court of chancery might interpose to remove it.

498. To what extent the court of chancery would give an account of the *mesne* profits, seems to be a disputed question in England. It has been contended, on the one hand, that in

[1] Harrison *v.* Eldridge, 2 Halst. 392.

[2] Hartshorne *v.* Hartshorne, 1 Green Ch. 349; 2 Scribner on Dower, 143.

[3] 4 Kent's Com. 71.

[4] 2 Scribner on Dower, 656.

[5] 20 Hen. III., c. 1. See 1 Washburn on Real Prop. 231, 232.

[6] 2 Scribner on Dower, 656

[7] Whether damages could be recovered against the alienee in the case of a demand being made, seems to be doubtful. 2 Scribner on Dower, 666.

giving damages, courts of equity are not confined by the terms of the statute of Merton, but award the same independently of the provisions of that statute, and consequently, in cases to which that statute does not extend.[1] On the other hand, it is said that the power of the chancellor is regulated by that statute, and that damages are not given as against the alienee of the husband.[2]

In America it has been stated by high authority that, in equity, the course is universally to give the widow an account of the rents and profits from the death of the husband;[3] and similar decisions have been made in several States.[4]

But in other States a different conclusion has been reached.[5]

Whatever the rule on this subject may be, the superior facilities which courts of equity have for ascertaining the rents and profits, and taking an account, must be considered as one of the reasons for their assumption of jurisdiction in cases of dower.

Moreover, there are some cases in which equity will undoubtedly give damages, although a court of law would not. At law, if the tenant died after judgment, and before damages were assessed, the widow lost her damages; and if the widow died before damages were assessed, her representatives could not claim them. But a court of equity will, in such cases, give relief.[6]

499. By proceedings in equity, moreover, a multiplicity of suits is frequently prevented.

Thus, it sometimes happens, that, before obtaining an assignment of dower, it is necessary that a term of years should be got out of the way as a satisfied term,[7] or a fraudulent convey-

[1] Curtis *v.* Curtis, 2 Bro. C. C. 620; 1 Roper Husb. and Wife, 453, 454.

[2] Mundy *v.* Mundy, 2 Ves., Jr. 122; 4 Bro. C. C. 294; 1 Roper Husb. and Wife, 454, note; 2 Scribner on Dower, 685, 686.

[3] Chase's Case, 1 Bland Ch. 206. See, also, Wells *v.* Beall, 2 Gill & J. 468; Darnall *v.* Hill, 12 Id. 388.

[4] Keith *v.* Trapier, 1 Bailey, (Eq.) 63; Heyward *v.* Cuthbert, 1 McCord, 386; Turner *v.* Morris, 27 Miss. 733.

[5] Tod *v.* Baylor, 4 Leigh, 498; Kendall *v.* Honey, 5 Mon. 282; Golden *v.* Maupin, 2 J. J. Marsh, 236. See 2 Scribner on Dower, 687, 692, where the authorities are examined.

[6] Story's Eq. Jurisp., § 625.

[7] See remarks of Lord Hardwicke in Dormer *v.* Fortescue, 3 Atk. 130.

ance set aside,[1] or conflicting rights to the subject-matter of the bill settled.[2]

This preliminary relief, as well as the assignment of dower itself, can be obtained in equity in one suit, to which all those who are interested may be made parties, and thus all rights and interests may be settled by a decree. Other illustrations of this double relief may be found in those cases in which bills have been filed by widows to redeem encumbered estates, and for dower therein.[3]

500. Another reason for the assumption by the court of chancery of jurisdiction in matters of dower, was the fact that in some cases the title of the husband to the property, and consequently that of the widow to her dower therein, was cognizable solely in equity, and there was, therefore, a complete failure of justice in courts of law. Such was the case when dower was claimed out of equitable estates, and out of equities of redemption, and in some other instances. In such cases the jurisdiction of courts of equity, in the assignment of dower, is exclusive.

It is true that in England, prior to the statute of 3 & 4 Wil. IV., c. 105, dower could not have been claimed out of equitable estates, and, therefore, as equity follows the law, a court of chancery would not allow a claim for dower where a *legal* right thereto could not have been established. But in this country, the general rule is, perhaps, the other way, and dower is allowed out of equitable estates. The consequence is, that as these estates are recognised only in courts of chancery, it is in such courts only that the right of dower in these estates can be enforced, and the jurisdiction of courts of chancery is, in such cases, exclusive.[4]

Prior to the statute of William IV., above cited, equities of redemption fell under the same rule as ordinary equitable estates,

[1] Swaine *v.* Perine, 5 Johns. Ch. 482; London *v.* London, 1 Humph. 1; Davis *v.* Davis, 5 Missouri, 183; Tate *v.* Tate, 1 Dev. & Bat. Eq. 22; Petty *v.* Petty, 4 B. Mon. 215.

[2] Goodburn *v.* Stephens, 1 Maryl. Ch. Dec. 420; 5 Gill, 1.

[3] Farwell *v.* Cotting, 8 Allen, 211; Strong *v.* Converse, Id. 557; Chiswell *v.* Morris, 1 McCart. 101, Eldridge *v.* Eldridge, Id. 195; Mantz *v.* Buchanan, 1 Maryl. Ch. Dec. 202; Scribner on Dower, vol. i., chap. xxiii.

[4] McMahan *v.* Kimball, 3 Blackf. 1; 2 Scribner on Dower, 151.

so far as the right of dower was concerned. In this country, however, the mortgagor is generally, perhaps universally, regarded as invested with the legal fee, and dower may be claimed by his widow, both by action at law and by bill in equity, as against all persons except the mortgagee and those claiming under him. As against them, her only remedy is by bill in equity.[1]

Other cases also may arise in which the right to dower is controlled by equitable considerations. Thus, in equity, lands used for partnership purposes are considered as personalty, and the widow's claim for dower must be postponed until the affairs of the firm are settled. The consequence is, that if the settlement is improperly delayed, the widow may file a bill for the adjustment of the business of the concern, and the assignment of her dower.[2] So, also, the widow of a purchaser of real estate, on which the purchase-money has been but partially paid, may file a bill to compel her husband's representatives to complete the purchase, and even to sell the land for that purpose, and allow her a proportionate part of the surplus as her dower.[3]

So, also, where estates out of which widows are entitled to dower are sold by order of court, or are so sold as to give courts of equity jurisdiction over the money, these courts will entertain jurisdiction of the widow's claim for dower out of the fund.[4]

501. From the above sketch of the grounds upon which the jurisdiction of courts of equity in bills for dower is founded, the general conclusion may be reached that these courts have concurrent jurisdiction with courts of law in all cases, and that no special difficulty in the way of enforcing the right at common law need exist, in order to invoke the jurisdiction of the chancellor.[5] The point appears to have arisen in Mundy *v.* Mundy,[6] where a demurrer to a bill for dower was overruled, although

[1] See Gibson *v.* Crehore, 3 Pick. 475; 1 Wash. on Real Prop. 246; Farwell *v.* Cotting, 8 Allen, 211; Strong *v.* Converse, Id. 557; Chiswell *v.* Morris, 1 McCart. Ch. 101; Eldridge *v.* Eldridge, Id. 195; 2 Scribner on Dower, 151.

[2] Goodburn *v.* Stevens, 1 Maryl. Ch. Dec. 420; 5 Gill, 1.

[3] Thompson *v.* Cochran, 7 Humph. 72; Daniell *v.* Leitch, 13 Grat. 195.

[4] Sabele *v.* Sabele, 1 Johns. Ch. 45; 1 Washburn on Real Prop. 245.

[5] See note to Agar *v.* Fairfax, 2 Lead. Cas. Eq. 482 (4th Eng. ed.).

[6] 2 Ves., Jr. 122.

the bill contained no allegation that there was any impediment to the complainant's remedy in an action at law. But while the jurisdiction of courts of equity to assign dower is undoubted, yet it may be laid down as a universal rule, that in cases where the *right* of the widow to dower is controverted, that question must be tried by a jury; and the chancellor will either direct an issue to be framed, or order the bill to be retained until the right shall have been tried at law.[1] The practice in this country is said to be to retain the bill for a reasonable time until the right at law is established.[2] Equity, however, will aid the widow by discovery for the purpose of establishing her right at law.[3]

Ordinarily, in bills for assignment of dower, the defendant is confined to strictly legal matters of defence, as the claim is treated as a *legal* claim; and in several decisions in the United States it has been held (contrary to the English doctrine),[4] that the plea of a *bona fide* purchase for value is no defence, even in a court of equity, against a legal claim for dower.[5] But in several instances, equitable matters of defence have been allowed to be set up;[6] and it may be possible that the influence of the modern English authorities, upon the effect of pleading a purchase, will induce the courts to adopt a different position from that taken in Snelgrove *v.* Snelgrove and the kindred cases cited above.[7]

[1] Mundy *v.* Mundy, 2 Ves., Jr. 122; D'Arcy *v.* Blake, 2 Sch. & Lef. 390; Daniels's Chan. Prac. 1139,

[2] Badgely *v.* Bruce, 4 Paige, 98; Swaine *v.* Perine, 5 Johns. Ch. 482; Hartshorne *v.* Hartshorne, 1 Green Ch. 349; Rockwell *v.* Morgan, 2 Beas. Ch. 384; Wells *v.* Beall, 2 Gill. & J. 468; Sellman *v.* Bowen, 8 Id. 50; 2 Scribner on Dower, 149.

[3] Curtis *v.* Curtis, 2 Bro. C. C. 620; D'Arcy *v.* Blake, 2 Sch. & Lef. 387.

[4] In Gomm *v.* Parrott, 3 C. B. (N. S.), 47, it was decided flatly that a demandant in dower is not entitled to inspection of the deed under which the property out of which she claims to be endowed was conveyed away by her husband, as against a *bona fide* purchaser for value without notice of the marriage.

[5] Snelgrove *v.* Snelgrove, 4 Dessaus. 288; Larrowe *v.* Beam, 10 Ohio, 498; Campbell *v.* Murphy, 2 Jones Eq. 357; Ridgeway *v.* Newbold, 1 Harring. (Del.) 385; Dick *v.* Doughton, 1 Del. Ch. 320; Gano *v.* Gilruth, 4 G. Greene, (Iowa) 453; 2 Scribner on Dower, 157.

[6] See Ralls *v.* Hughes, 1 Dana, 407; Bullock *v.* Griffin, 1 Strob. Eq. 60; Steiger *v.* Hillen 5 Gill & J. 121; 2 Scribner on Dower, 157, 158.

[7] See Flagg *v.* Mann, 2 Sumn. 486. It will be remembered that in the chapter upon Notice (*ante*, p. 331) it was stated that the holder of an equitable title may avail himself of want of no-

502. The right to dower having been admitted or established, its assignment is effected by means of a reference to a master and a commission, and the share is set out by metes and bounds, and possession ordered to be delivered. When necessary, also, an account will be taken.

If, for any cause, the land out of which the dower is claimed has been turned into money, the widow will be entitled to dower out of the fund. The practice in such cases is not uniform throughout the Union. In some States a gross sum is awarded, in others an annual interest is secured to the complainant.[1]

In addition to the remedies by the common-law writs, and by bill in equity, there are, in many States, summary proceedings in probate courts and courts of similar jurisdiction for the assignment of dower out of the estates of decedents. Proceedings of this nature are necessarily more limited in their scope than the other remedies. They are the subject of express legislation in most of the States.

503. Somewhat analogous to the jurisdiction in cases of partition and dower is that which courts of chancery occasionally assume in cases of disputed boundaries. This jurisdiction is of ancient date,[2] and appears to have met with more favor in the early period of the history of equity jurisprudence than it has done in modern times. The origin of the jurisdiction is a subject as to which there has existed some difference of opinion, Lord Keeper Henley, in the leading case of Wake *v.* Conyers,[3] ascribing it to the equity of preventing a multiplicity of suits, while Sir William Grant[4] was of opinion that it grew up in

tice as a defence, and that he may do this even when the plaintiff is the holder of the legal title; but that to this rule there is one exception, viz., that where the bill is filed simply to enforce a legal right through an equitable remedy, a plea of purchase for value will be overruled. Snelgrove *v.* Snelgrove and the other American authorities cited in note 5 (*supra*), as also the English decisions of Collins *v.* Archer, 1 Russ. & My. 284, and Williams *v.* Lambe, 3 Bro. C. C. 264 (*ante*, p. 332) may therefore be reconciled with the general doctrine of pleading a purchase upon the principle thus stated. See Phillips *v.* Phillips, 1 De G., F. & J. 208; Finch *v.* Shaw, 19 Beav. 500; Wallwyn *v.* Lee, 9 Ves. 24; Pilcher *v.* Rawlins, L. R., 7 Ch. 269; *ante*, § 264.

[1] See 2 Scribner on Dower, 190.

[2] See Perry *v.* Pratt, 31 Conn. 433.

[3] 2 Lead. Cas. Eq. 433 (4th Eng. ed.).

[4] Speer *v.* Crawter, 2 Meriv. 410.

analogy to the old common-law writs, *De rationalibus divisis* and *De perambulatione faciendâ*, whenever equitable grounds for invoking such a relief existed. The point is of no great practical importance, as the exercise of the jurisdiction in modern times is not of frequent occurrence.

The general rule may now be stated to be that a court of equity has no jurisdiction to fix the boundaries of legal estates unless some equity is superinduced by the act of the parties,[1] or unless some particular circumstance of fraud or confusion exists.[2] Thus, where the owner of land broke down the dam, and ploughed up the race-way which led from it, so as to render it difficult for the complainant, who was entitled to use both the dam and the race, to ascertain and define their course and situation, it was held that relief was properly sought for in chancery.[3] And where the settlement of a boundary was necessary, under the circumstances of the case, to prevent a multiplicity of suits, the jurisdiction was sustained.[4] But a mere confusion of boundaries, without more, will not be enough to sustain a bill.[5] And the circumstance that the plaintiff has only an equitable title, and that the legal title is outstanding in the hands of trustees, will not be enough to give jurisdiction.[6]

To sustain the bill the plaintiff must show that some portion of the land is in possession of the defendant;[7] and he must establish by admissions of the defendant, or by evidence a clear title to some land in the possession of the defendant.[8]

[1] See Hicks *v.* Hastings, 3 K. & J. 701, for an exceptional case.

[2] Wake *v.* Conyers, 1 Eden, 331; Wolfe *v.* Scarborough, 2 Ohio St. 361; 2 Lead. Cas. Eq. 433 (4th Eng. ed.).

[3] Merriman *v.* Russell, 2 Jon. Eq. 470.

[4] De Veney *v.* Gallagher, 5 C. E. Green, 33; Bute (Marquis) *v.* Glamorganshire Canal Co., 1 Phillips, 681; Bouverie *v.* Prentice, 1 Bro. C. C. 200; Mayor of York *v.* Pilkington, 1 Atk. 282.

[5] See Norris's Appeal, 14 P. F. Sm. 275; Tillmes *v.* Marsh, 17 Id. 507; Haskell *v.* Allen, 23 Maine, 448; Doggett *v.* Hart, 5 Florida, 215, 232; Wolcott *v.* Robbins, 26 Conn. 236; Dickerson *v.* Stoll, 4 Hals. 294; Topp *v.* Williams, 7 Humph. 569.

[6] Stuart's Heirs *v.* Coalter, 4 Rand. 74; Doggett *v.* Hart, 5 Florida, 215.

[7] Att. Gen. *v* Stephens, 6 De G., M. & G. 111, 149; overruling the Vice-Chancellor in 1 K. & J. 724.

[8] Godfrey *v.* Littel, 1 Russ. & My. 59; 2 Russ. & My. 630. It is not necessary that the title should be *admitted* by the defendant; it may be established by evidence; Godfrey *v.* Littel (*supra*), overruling Bishop of Ely *v.* Kenrick, Bunb. 322.

504. In several cases in England relief has been afforded to the owner of a rent, upon principles analogous to those which are applied in cases of confusion of boundaries. The owner of the rent is entitled to relief in equity (as it is said), "on usage of payment," where, in consequence of the confusion of boundaries or otherwise, the particular lands upon which the rent is a charge cannot be fixed on as a fund for the legal remedy by distress.[1] A very few cases, in which relief was given in equity in matters of rent, exist in the United States; but the instances of the exercise of this jurisdiction are very rare.[2]

[1] See Duke of Leeds *v.* Powell, 1 Ves., Sr. 171, 172; North *v.* The Earl of Strafford, 3 P. Wms. 148; Bouverie *v.* Prentice, 1 Bro. C. C. 200; Duke of Leeds *v.* The Corporation of New Radnor, 2 Bro. C. C. 518; Mayor of Basingstoke *v.* Lord Bolton, 1 Drew. 289; note to Wake *v.* Conyers, 2 Lead. Cas. Eq. 445 (4th Eng. ed.). See, also, Benson *v.* Baldwin, 1 Atk. 598.

[2] Dawson *v.* Williams, 1 Freem. Ch. 99; Lawrence *v.* Hammett, 3 J. J. Marsh. 287. See Livingston *v.* Livingston, 4 Johns. Ch. 287, 290. In Story's Equity Jurisprudence, chap. xvi., a number of instances in which the English High Court of Chancery has exercised jurisdiction in matters of rent, are grouped together. These cases, however, seem referable to other heads of equity jurisdiction (such as Discovery, Specific Performance, etc.); and do not constitute a distinctive equitable remedy. It may be doubted whether, in modern times, the courts will not refuse to follow many of these old authorities; see Walters *v.* The Northern Coal Mining Company, 5 De G., M. & G. 629, 646, 647.

CHAPTER V.

PARTNERSHIP BILLS.

505. Reasons for resorting to equity in partnership cases.
506. Nature of the contract of partnership.
507. Many equitable remedies applied to partnership cases.
508. Peculiar remedy by Partnership Bills; Bills for account need not pray a dissolution.
509. Causes of dissolution; Grounds for bills for dissolution.
510. Preservation of partnership property.
511. Doctrine of conversion as applied to partnership real estate; rule in England.
512. Rule in the United States.
513. Qualifications of the rule.
514. Sale and account.
515. Winding-up partnerships; joint and separate debts.
516. Separate assets of deceased partner applied in the first instance to payment of separate debts.
517. Extension of this doctrine; English rule.
518. Rule in *Tucker* v. *Oxley*.
519. Bankrupt Act of 1867.
520. Method in which joint creditors may collect their debts.
521. Remedies of separate creditors.
522. Joint and separate executions.
523. Suits between firms having a common member.
524. Mines.

505. When the relations which exist between partners come to be dealt with by judicial tribunals, it is sometimes found necessary, in order to do justice between the parties, that an account should be taken, that a dissolution should be decreed, that assets should be called in and protected, that a sale of partnership property should be ordered, and that an equitable distribution of the proceeds should be made.

It is evident that none of these desired ends can be fully attained by common-law process, and some of them cannot be attained at all. An action of account may, it is true, be brought; but the disadvantages of that action, and the superiority of the equitable procedure, have been already pointed out. Breaches of distinct agreements in the partnership articles may also be the subjects of the common-law actions of covenant or assumpsit, according as the articles are under seal or in parol; and actions have, moreover, been brought to recover damages for a wrongful

dissolution, or for refusing to enter into a stipulated partnership.[1] But no common-law writ exists by which a partnership can be dissolved, its assets protected pending litigation between the partners, or a sale of the partnership property ordered; nor do the common-law rules as to debtor and creditor furnish a system for the proper distribution of the partnership effects. Hence there has arisen a necessity for an equitable remedy based upon the inability of the common-law courts to answer the requirements of justice. Bills for applying this equitable remedy are termed Partnership Bills; and are, generally, designed to effect a dissolution of the partnership, the protection of its property, an account, and a distribution of its assets.

506. This inability of the common-law forms of action to deal with many of the consequences of the contract of partnership, grows out of the nature of the contract itself—which is one of agency, each partner holding towards his copartner the double position of principal and agent. Hence arises the capacity of each partner to contract partnership debts, and to acquire and deal with partnership assets, and to enjoy his due proportion of the profits of the concern.[2]

A dissolution of the partnership is a rescission of the contract, and *this* a court of law cannot compel; and the faithful performance of this contract necessitates a rendering of accounts, and a guardianship and distribution of property, which a court of law cannot adequately enforce.

507. It must be remembered that the relations of partners with each other, and with third parties, may give rise to many reasons for the interference of a chancellor, which do not call for the exercise of the particular equitable remedy now under consideration. Thus a bill may, under certain circumstances, be filed to compel the execution of partnership articles,[3] or com-

[1] Addams *v.* Tutton, 3 Wright, (Pa.) 447; McNeill *v.* Reid, 9 Bing. 68; Vance *v.* Blair, 18 Ohio, 532; Parsons on Partnership, 237. See, also, Hale *v.* Wilson, 112 Mass. 444, an action at law to recover money which the plaintiff had been fraudulently induced to contribute to a partnership capital.

[2] Cox *v.* Hickman, 8 H. L. Cas. 268.

[3] The better opinion now seems to be that if two persons have agreed to enter into partnership, and one of them refuses to abide by the agreement, the remedy for the other is, generally, an action for damages, and not a bill for specific performance. Scott *v.* Rayment, L. R., 7 Eq. 112; Hercy *v.* Birch, 9 Ves. 357; Lindley

pliance with particular stipulations in the same;[1] but such a bill is one in which the peculiar remedy of specific performance is invoked: and would, therefore, fall under that general head of equitable jurisdiction. So, also, an *injunction* may be obtained to prevent a violation of partnership articles, or a misappropriation of partnership funds,[2] or (in some cases) a wrongful dissolution of the firm;[3] while the equitable remedy of *discovery* may be, and frequently is, called into play for the purpose of enabling one partner to assert his rights against his copartner.[4]

508. But the basis of the equitable remedy now to be noticed is the necessity for the due winding up of a partnership; and this equity alone, independently of any other considerations, will entitle a suitor to demand relief at the hand of a chancellor.[5]

A question which frequently arises upon the threshold of this subject is, whether a bill for an account which does not seek a dissolution of the partnership will be entertained. It is asserted by some text writers that such a bill will not lie;[6] that is to say, that equity will not interfere to order an account which contemplates a continuance of the partnership. But the proposition cannot, perhaps, be so broadly stated.

on Partnership, 991 (3d ed.); Parsons on Partnership, 235; Crawshay *v.* Maule, 1 Swanst. 511, and notes. To compel an unwilling person (it has been said) to become a partner with another, would not be conducive to the welfare of the latter, any more than to compel a man to marry a woman he did not like, would be for the benefit of the lady. Lindley on Partnership, *ut sup.* However, if the parties have agreed to execute some formal instrument, which would have the effect of altering their position at law, and of conferring rights which do not exist so long as the agreement is not carried out, in such a case, and for the purpose of putting the parties into the legal position agreed upon, the execution of that formal instrument may be decreed, although the partnership thereby formed might be immediately dissolved. See England *v.* Curling, 8 Beav. 129; Lindley on Partnership, 992.

[1] See Whittaker *v.* Howe, 3 Beav. 383; Turner *v.* Major, 3 Giff. 442; Lingen *v.* Simpson, 1 Sim. & Stu. 600; Morris *v.* Kearsley, 2 Y. & C. Exch. 139; Essex *v.* Essex, 20 Beav. 442; Homfray *v.* Fothergill, L. R., 1 Eq. 567; Aubin *v.* Holt, 2 K. & J. 66; Lindley on Partnership, 994, 995, (3d ed.). See, also, Downs *v.* Collins, 6 Hare, 418; Cooper *v.* Hood, 7 Week. Rep. 83.

[2] See *ante*, § 426. Lindley on Partnership, 1053 (3d ed.).

[3] See Blissett *v.* Daniel, 10 Hare, 493; Lindley on Partnership, 232 (3d ed.).

[4] Lindley on Partnership, 1012 (3d ed.).

[5] Id. 1078.

[6] Adams's Doct. Eq. 241.

In England, while the question may not be entirely settled, the current of modern authority is certainly in favor of relaxing the rule; and it may be laid down, as a general proposition, that courts of equity will not, if they can avoid it, allow a partner to derive advantage from his own misconduct, by compelling his copartner to submit either to a continued wrong or to a dissolution.[1] The rule will certainly not be applied to the case of joint stock companies, or other associations of which the members are very numerous.[2]

In Pennsylvania it has been decided that a bill for an account will be entertained, although it does not pray a dissolution.[3]

509. Bills for the administration of partnership assets may either be filed after dissolution, or they may be filed for the purpose of obtaining a decree for a dissolution and subsequent administration.

It is well known that a partnership may be dissolved in many ways. Thus a dissolution may result either from the effluxion of time, or from mutual agreement, or from the death or bankruptcy of a partner, or from a seizure and sale of a partner's share under an execution, or from a voluntary assignment by one partner of all his interest in the firm, or from the act of God, or the act of government (as from a war between the countries of the partners), or from some of the members becoming a body politic.[4] So, if no specific term for the duration of the partnership has been fixed, it may be dissolved at the option of any of the partners; and even where a partnership has been formed for a definite period, it has been held, in some cases, that it was within the power of any partner to dissolve it.[5] Where a partnership has been thus dissolved, the objects of the bill

[1] Fairthorne *v.* Weston, 3 Hare, 392; Lindley on Partnership, 934, 1003, 1004 (3d ed.). See Walworth *v.* Holt, 4 Myl. & Cr. 619.

[2] Adams's Doct. Eq. 241.

[3] Hudson *v.* Barrett, 1 Pars. Eq. 414. See Marble Co. *v.* Ripley, 10 Wal. 339, and Parsons on Partnership, 300, note *u*.

[4] In Lindley on Partnership, 231 (3d Eng. ed.), the grounds for a dissolution are stated to be the following: 1. The will of any partner; 2. The impossibility of going on in consequence of the hopeless state of the partnership business, or insanity, or misconduct and destruction of mutual confidence; 3. The transfer of a partner's interest; 4. Death; 5. The occurrence of some event which renders the continuance of the partnership illegal; and 6. Fraud vitiating the original contract. See, also, Parsons on Partnership, chap. xii.

[5] Skinner *v.* Dayton, 19 Johns. 538; Mason *v.* Connell, 1 Whart. 381; and see Bishop *v.* Breckles, 1 Hoff. Ch.

are that an account should be taken, and that the firm assets should be properly protected and duly distributed. But in many partnership suits the main object of the bill is a decree for a dissolution;[1] and such a decree can, of course, only be made upon proper cause. The general ground for a dissolution is that the partnership cannot be carried on for the benefit of the parties, according to the original intention; and this may result either from something independent of the conduct of the partners, *e. g.*, that the principles upon which the partnership is based are found to be erroneous and impracticable;[2] or from the conduct of a partner, as if he is acting fraudulently, is assuming exclusive control of the business, or is guilty of breaches of faith, or other gross misconduct;[3] or from the incapacity of a partner, as, for example, his lunacy.[4]

But trifling faults, or quarrels between the parties, will not justify a decree for dissolution;[5] nor will such a decree be necessarily warranted by a breach of partnership articles.[6]

534. But the law has been assumed to be the other way in several authorities. See Peacock *v.* Peacock, 16 Ves. 57; Crawshay *v.* Maule, 1 Swanst. 508; Wheeler *v.* VanWart, 9 Sim. 193; Pearpoint *v.* Graham, 4 Wash. C. C. 232; Parsons on Partnership, 404.

[1] In Master *v.* Kirton, 3 Ves. 74, the bill was demurred to on the ground that the partnership was a partnership at will, and could, therefore be dissolved without a decree of the court. The demurrer was overruled.

[2] See Baring *v.* Dix, 1 Cox, 213. And a dissolution may be decreed where the original capital has been all spent, and some of the partners are unable or unwilling to advance more money, and at the same time the concern cannot go on except at a loss unless they do. Jennings *v.* Baddeley, 3 K. & J. 78.

[3] See Kennedy *v.* Kennedy, 3 Dana, 239; Williamson *v.* Wilson, 1 Bland, 418; Berry *v.* Cross, 3 Sandf. Ch. 1; Holden *v.* McMakin, 1 Pars. Eq. Cas. 270; Miller *v.* Jones, 39 Illinois, 54; Maynard *v.* Railey, 2 Nevada, 313, 318; Shulte *v.* Hoffman, 18 Tex. 678; Seibert *v.* Seibert, 1 Brewster, 531; Page *v.* Vankirk, Id. 287.

[4] Anonymous, 2 K. & J. 441; Jones *v.* Lloyd, L. R., 18 Eq. 265. The better opinion now seems to be that lunacy of one of the partners will not *ipso facto* be a dissolution, although, when of a confirmed character, it will warrant a decree for dissolution. Jones *v.* Noy, 2 Myl. & K. 125; Rowlands *v.* Evans, 30 Beav. 302; Lindley on Partnership, 235, 236 (3d ed.). In Davis *v.* Lane, 10 N. Hamp. 161, and Isler *v.* Baker, 6 Hump. 85, however, the rule that lunacy did not operate, of itself, as a dissolution, was disapproved. See Parsons on Partnership, 465.

[5] Goodman *v.* Whitcomb, 1 J. & W. 569; Henn *v.* Walsh, 2 Edw. C. R. 129; Parsons on Partnership, 458; Lindley on Partnership, 238 (3d ed.). See, also, Bishop *v.* Breckles, 1 Hoff. Ch. 534; Watney *v.* Wells, 30 Beav. 56; Stevens *v.* Yeatman, 19 Maryl. 480.

[6] Anderson *v.* Anderson, 25 Beav. 190

510. If the partnership has become *ipso facto* dissolved for any of the reasons mentioned above, or if a decree for its dissolution has been made for cause, the next subject which occupies the attention of the court is the necessity for preserving the property of the firm, and for the intermediate management of the concern, while the process of winding-up is going on. If there is no objection, these duties may be left to the parties. The duty of liquidation is sometimes assigned to one partner by express agreement, and it sometimes devolves upon him by operation of law—as in the case of a surviving or solvent partner. But where all the partners are dead, or where the management of affairs cannot be safely entrusted to any of the parties, the court will interfere, and will appoint a receiver to take charge of the property and wind up the business.

It would be impossible to enter into a detailed statement of all the causes which will justify the appointment of a receiver.[1] It will be sufficient to observe here, that where a dissolution has been decreed in consequence of the improper conduct of parties, or for some similar cause, a receiver will be appointed as a matter of course, the reason being that the same causes which justify a decree for dissolution in such cases will also justify an appointment of a receiver; but that where a dissolution has already taken place, and the bill is filed simply for a proper administration of partnership assets, a receiver will not be appointed as a matter of course, but only when there is some mismanagement or improper conduct on the part of the person who has the custody of the property.[2]

The remedy of injunction is also sometimes called into play upon proper cause shown.[3]

511. In pursuing the duty of getting in and administering

[1] For authorities illustrative of the cases in which receivers will be appointed, see Hall *v.* Hall, 3 MacN. & G. 90; Const. *v.* Harris, T. & R. 517; Gowan *v.* Jeffries, 2 Ashmead, 296; Williamson *v.* Wilson, 1 Bland, 418; Randall *v.* Morrell, 2 C. E. Green, 346; Holden *v.* McMakin, 1 Pars. Eq. Cas. 270; Miller *v.* Jones, 39 Ill. 54; Saylor *v.* Mockbie, 9 Withrow, (Ia.) 209; Boyce *v.* Burchard, 21 Georgia, 74; Maynard *v.* Railey, 2 Nevada, 313; Shulte *v.* Hoffman, 18 Tex. 678; Seibert *v.* Seibert, 1 Brewster, 531; Page *v.* Vankirk, Id. 287; Kerr on Receivers, 90 *et seq.* (2d Am. ed.).

[2] Kerr on Receivers, *ut sup.* Even where a dissolution is contemplated by the decree, it is not in all cases, proper to appoint a receiver; Kerr on Receivers, 97 (2d Am. ed.).

[3] *Ante*, § 426.

the partnership assets, a court of chancery has the power to order a sale of real estate.

It is a general rule that when real estate is purchased with partnership funds for partnership purposes, and without any intention of withdrawing the funds from the firm for the use of all or any of the members thereof as individuals, such real estate is to be considered as partnership property, and as liable to all the equitable rights of the partners between themselves.[1] The result of this rule is that as each partner has an equity to insist upon a sale of such real estate, it is to be treated as personalty for the purposes of the partnership; but whether it is to be so treated for *all* purposes is a question upon which there has been some conflict of authority.

It has been contended, on the one hand, that the conversion of realty into personalty is a conversion "out and out," and that after it has been appropriated to the partnership liabilities, the surplus (if any) is payable to the personal representatives and not to the heir of a deceased partner. This is now the rule in England. After some fluctuations in the law, the conclusions which have been finally reached are that wherever a partnership purchases real estate for the partnership purposes and with partnership funds, it is, as between the real and personal representatives of the partners, personal estate;[2] that it makes no difference as respects the question of conversion, whether the land was purchased with partnership moneys, or whether it was acquired in any other way, provided the land is, in the proper sense of the term, an asset of the partnership;[3] but that the general rule may be excluded by an agreement, express or implied, to the effect that the land shall not be sold, for the reason of the rule (which is that each partner has an equity for a sale of the land) excludes its application in such a case.[4]

[1] Buchan *v.* Sumner, 2 Barb. Ch. 198; Hoxie *v.* Carr, 1 Sumn. 181; Abbott's Appeal, 14 Wright, (Pa.) 234; Meily *v.* Wood, 21 P. F. Sm. 488; Foster *v.* Barnes, 31 Id. 377; Uhler *v.* Semple, 5 C. E. Green, 288; Sigourney *v.* Munn, 7 Conn. 11; Wallis *v.* Freeman, 35 Verm. 44; Clagett *v.* Kilbourne, 1 Black, (U. S.) 346; 3 Kent's Com. 39 Parsons on Partnership, 363, 369.

[2] Darby *v.* Darby, 3 Drew. 506.

[3] See the remarks of Lord Eldon in Jackson *v.* Jackson, 9 Ves. 593. See, also, Waterer *v.* Waterer, L. R., 14 Eq. 402.

[4] Steward *v.* Blakeway, L. R., 4 Ch. 603, and L. R., 6 Eq. 479; Lindley on Partnership, 690, 691 (3d ed.).

512. In the United States, however, the general tendency of the authorities is to limit the conversion to the purposes of the partnership, and *ultra* those purposes to treat the property as if in its original state. The consequence of this doctrine is that the surplus, after the partnership liabilities and equities have been answered, will go to the real, and not to the personal representatives of a deceased partner. This is perhaps the general doctrine throughout the Union;[1] although in Kentucky the English rule is followed,[2] and in Virginia the question does not seem to be settled, the English rule having been at one time adopted;[3] and the point in subsequent decisions having been treated as doubtful.[4]

513. The general rule as to conversion, stated above,[5] is, it will be observed, subject to the qualification that where the purchase is made with an intention of withdrawing the funds from the firm for the use of all or any of the members thereof as individuals, the real estate so purchased will not be considered as personal property—in other words, the doctrine of conversion will not apply; and further, that if land belongs to all the partners as tenants in common, but not as partners, and the land is used by them for partnership purposes, but is, nevertheless, intended to remain vested in them as tenants in common, and not to form part of the assets of the firm, the share of each partner will be real, and not personal estate.

A result of the first portion of the above qualification has been held in Pennsylvania to be, that to affect strangers—purchasers, mortgagees and creditors—there must be some written evidence of the intention of the partners to make the real estate partnership assets, and that where there is simply a conveyance

[1] Dyer *v.* Clark, 5 Met. 562; Wilcox *v.* Wilcox, 13 Allen, 254; Shearer *v.* Shearer, 98 Mass. 107; Buchan *v.* Sumner, 2 Barb. Ch. 165, 201; Tillinghast *v.* Champlin, 4 R. Island, 173; Foster's Appeal, 24 P. F. Sm. 397. See, also, Goodburn *v.* Stevens, 1 Maryl. Ch. 420; 5 Gill. 1; Hale *v.* Plummer, 6 Ind. 121; Piper *v.* Smith, 1 Head. 93; Dilworth *v.* Mayfield, 36 Miss. 40; Scruggs *v.* Blair, 44 Id. 406; Lang *v.* Waring, 25 Alabama, 625; Espy *v.* Conier, 76 Ibid. 501. See, however, Ware *v.* Owens, 42 Id. 212; 3 Kent's Com. 40 (12th ed.); Parsons on Partnership, 371; American note to Lake *v.* Gibson, 1 Lead. Cas. Eq. 295 (4th Am. ed.).

[2] Bank of Louisville *v.* Hall, 8 Bush, 672; Cornwall *v.* Cornwall, 6 Id. 69

[3] Pierce *v.* Trigg, 10 Leigh, 406.

[4] Jones *v.* Neale, 2 Pat. & H. 339; Davis *v.* Christian, 15 Grat. 11.

[5] *Ante*, p. 561.

to them as tenants in common, it is not competent to show by parol evidence that the property was in fact designed to form part of the partnership assets,[1] or even that this fact was known to a purchaser.[2]

The opinion in other States of the Union appears to be adverse to following this doctrine, at least to the same extent.[3]

Of the second part of the above-stated qualification, an illustration may be found in Steward *v.* Blakeway,[4] where it was held that a farm and quarry worked by co-owners in partnership, and additional lands bought by them out of their profits for the purposes of their business, were not to be treated as converted into money, because no partner could have enforced a sale of the property.

514. Both the realty and the personalty of the firm may be sold by order of court; and a sale is generally necessary in order to effect the winding-up of a concern; as it has been held that one partner cannot take the partnership stock at a valuation, but its value must be ascertained by its conversion into money.[5]

An account is a part of the relief which the court decrees in partnership bills. This account is taken before a master, who is armed with the necessary powers to effectuate the object for which he is appointed.[6] In taking the partnership accounts, a surviving partner will be regarded as a trustee, and will be ordinarily responsible for any profits which he may have made after the dissolution.[7]

515. After the partnership assets have been realized, the

[1] Ridgway's Appeal, 3 Harris, 177. See, also, McDermot *v.* Laurence, 7 Serg. & R. 438; Lefevre's Appeal, 19 P. F. Sm. 125; Ebbert's Appeal, 20 Id. 79; Appeal of Second National Bank, 2 Norris, 203; and Geddes's Appeal, 3 Id. 482.

[2] Hale *v.* Henrie, 2 Watts, 143.

[3] See Fall River Whaling Co. *v.* Borden, 10 Cush. 458; Parsons on Partnership, 378, note; Story on Partnership, § 93, note (6th ed.); Am. note to 1 Lead. Cas. Eq. 241 (3d Am. ed.).

[4] 4 Ch. 603. See Thompson *v.* Bowman, 6 Wal. 316.

[5] Sigourney *v.* Munn, 7 Conn. 11; Dickinson *v.* Dickinson, 29 Id. 600.

[6] Story's Eq. Jurisp., § 672. In England a number of statutes (commonly known as the winding-up Acts) have been passed facilitating the settlement of partnership affairs. They will be found collected and discussed in Lindley on Partnership, Book IV., chap. iii. (3d Eng. ed.).

[7] See Phillips *v.* Atkinson, 2 Bro. Ch. 272; Hartz *v.* Schrader, 8 Ves. 317; Waring *v.* Cram, 1 Pars. Eq. Cas. 522; Washburn *v.* Goodman, 17 Pick. 519; Case *v.* Abeel, 1 Paige Ch. 398; Parsons on Partnership, 442.

next step is their appropriation to the payment of partnership liabilities. In doing this the court applies certain equitable doctrines which might not improperly fall under the general head of Adjustment, but which it was thought might be more advantageously reserved for consideration in the present connection.

In the case of a winding-up of a solvent concern no conflict between the rights of different sets of creditors can, of course, occur. But where the partnership property is insufficient to meet the partnership liabilities, questions may, and frequently do, arise between the creditors of the firm and the creditors of individual members thereof.

It is a general rule in the first place, both in England and in this country, that partnership assets must be applied in the first instance to the payment of partnership debts.[1] This is not a right of the partnership creditors, but is an equity of each partner that the firm property should go to firm creditors. The equity of the joint creditors depends upon and must be worked out through the medium of the equities of the partners themselves.[2]

[1] Ex parte Cook, 2 P. Wms. 500; Lindley on Partnership, 1201 (3d ed.); Murrill *v.* Neill, 8 How. 414; Inbusch *v.* Farwell, 1 Black, (U. S.), 566; Crooker *v.* Crooker, 46 Maine, 250; 52 Id. 267; Treadwell *v.* Brown, 41 N. Hamp. 12; Fall River Whaling Co. *v.* Borden, 10 Cush. 458; Witter *v.* Richards, 10 Conn. 37; Morgan *v.* Skidmore, 55 Barb. 263; Hill *v.* Beach, 1 Beas. 31; Black's Appeal, 8 Wright, (Pa.) 503; McCormick's Appeal, 5 P. F. Sm. 252. See Story's Eq., § 675; Simmons *v.* Tongue, 3 Bland, 356; Tunno *v.* Trezevant, 2 Dessaus. 270; Lucas *v.* Atwood, 2 Stewart, 378; White *v.* Dougherty, 1 Mart. & Yerg. 309; Hubble *v.* Perrin, 3 Ham. 287; Talbot *v.* Pierce, 14 B. Monr. 195; Converse *v.* McKee, 14 Tex. 20; Parsons on Partnership, 347 and 480. "The extent of the application of this rule," said Cadwalader, J., in a recent case in the Circuit Court of the United States for the Eastern District of Pennsylvania, "is exemplified where two or more distinct partnerships are engaged together in a series of particular adventures or speculations by sea or land. The accounts of such joint concerns are properly stated together as accounts of an aggregate partnership of which each firm is one member; and if the several firms become insolvent, and their affairs are judicially administered, the assets which are avails of the aggregate investments are primarily applicable in payments of the debts of the aggregate concern to the exclusion or postponement of partnership debts of the several firms." Potter *v.* Hicks, May, 1878, Pamphlet. See remarks of Lord Justice James in Ex parte Dewhurst, L. R., 8 Ch. 968; where, however, the point did not arise.

[2] Ex parte Ruffin, 6 Vesey, 119;

516. It is, moreover, the rule in England and in many of the United States, that separate assets are to be applied in the first instance to the payment of individual debts; and that the joint creditors are entitled only to the surplus after such payment. In many other States, however, this rule has not been followed.[1] The origin of this doctrine appears to be as follows: At law in case of the death of a partner, the survivor alone was liable; the estate of the deceased partner could be reached only in equity.[2] But while equity regarded the estate of the deceased partner as assets for the payment of the firm debts, it was careful to observe the principles which govern the distribution of equitable assets, among which is the doctrine that legal priorities must be observed. As the individual creditors of the deceased partner had a legal right to be satisfied out of his estate, it necessarily follows that this right must be first regarded before the purely equitable right of the joint creditors could be enforced; in other words, the latter was logically postponed to the former. Hence the separate estate, in such a case, was said to be applicable, in the first instance, to pay the separate debts. So far the rule was perfectly logical; but its subsequent extension was, perhaps, not so.[3]

517. When both of the partners of a firm, of which the assets are in the course of distribution, are alive, or when the estate to be administered is that of the surviving partner, the joint creditors have an equal legal right with the separate creditors, the partnership debts being both joint and several. In such cases there is no reason for invoking any equity in favor of joint creditors to enable them to reach separate assets, because they are already entitled to do so by virtue of their legal position. Hence as the rights of all parties are of a strictly legal character, there

Campbell *v.* Mullett, 2 Swanst. 551, 575; Skipp *v.* Harwood, Id. 586; Allen *v.* The Centre Valley Co., 21 Conn. 130, 135; Washburn *v.* The Bank of Bellows Falls, 19 Verm. 278, 291; Doner *v.* Stauffer, 1 Pen. & Watts, 198; Lindley on Partnership, 1206 (3d ed.); American note to Silk *v.* Prime, 2 Lead. Cas. Eq. 392, 393 (4th Am. ed.).

[1] Gray *v.* Chiswell, 9 Ves. 119; Lindley on Partnership, 1201 (3d ed.); Allen *v.* Wells, 22 Pick. 453; Bardwell *v.* Perry, 19 Vt. 292; Murray *v.* Murray, 5 Johns. Ch. 60; Davis *v.* Howell, 20 Am. L. R. 461, and note; Pars. on Partnership, 480, 548.

[2] Hamersley *v.* Lambert, 2 J. C. R. 508.

[3] See American note to Silk *v.* Prime, 2 L. Cas. Eq. 391 (4th Am. ed.), where the authorities are examined, and the reason of the rule (as stated in the text) explained. See, also, Ex parte Dear; In re White, L. R., 1 Ch. D. 514.

would seem, logically, to be no reason why the rights of one set of creditors should be preferred over those of another set; in other words, why, in the distribution of the separate estate, the separate creditors should have any priority over the joint. But this line of reasoning, however sound it may be theoretically, has not, in practice, found favor with the English courts. The rule is now well settled that not only in the case of a deceased partner leaving his copartner surviving, but also in the case of the death of a surviving partner, or in the winding up of a partnership during the lifetime of both the parties, separate assets are to be applied in the first instance to the payment of separate debts, and that joint creditors are not entitled to come in until individual creditors are satisfied.[1] The theory upon which this rule is based appears to be that as joint assets are applicable in the first instance to joint debts, it is equitable that separate assets should in like manner be appropriated to separate debts;[2] and it has been, therefore, held not to apply to those cases in which there is no partnership property, and no living solvent partner. In such cases the joint creditors have a right to come in against the separate assets *pari passu* with the separate creditors.[3]

518. The English rule upon this subject has been adopted in many adjudged cases in this country, including at least one decision by the Supreme Court of the United States.[4] But the same high tribunal has decided the other way in Tucker *v.* Oxley;[5] where it was said to be unjust to apply the estate of each individual to the discharge of the several debts, to the

[1] Note to Silk *v.* Prime, 2 Lead. Cas. Eq. 381 (4th Am. ed.). This rule, however, will not be applied in cases of fraud. Thus where a partner fraudulently withdraws funds from the firm and appropriates them to his own use, the creditors of the firm are entitled to prove against the separate estate of the individual partner. Read *v.* Bailey, L. R., 3 App. Cas. 94. See, also, Ex parte Mayou, 4 De G., J. & S. 668; In re Cook & Gleason, 5 Russell, 122; Ex parte Sillitoe, 1 Gl. & J. 374, 382.

[2] "The rules so laid down are a sort of rough code of justice, because some rule must be laid down for the purpose of keeping joint and separate estates distinct, and for paying the joint and separate creditors. But this is a mere artificial distinction." Per James, L. J., in Lacey *v.* Hill, L. R., 8 Ch. 444. See, also, Davis *v.* Howell, 20 Am. Law Reg. (N. S.) 461 and note.

[3] Story on Partnership, § 380. See In re Litchfield, 5 Fed. Rep. 47. See, however, Warren *v.* Farmer, 100 Ind. 593. The subject of the distribution of joint and separate estates in bankruptcy, will be found discussed in Lindley on Partnership, Book IV., chap. ii., sect. iv.

[4] Murrill *v.* Neill, 8 How. 414; American note to Silk *v.* Prime, 2 Lead. Cas. Eq. 381.

[5] 5 Cranch, 34.

entire exclusion of the joint creditors, who previous to the bankruptcy of the partners had a legal and equitable right to satisfaction out of the separate estate of each; and a similar conclusion has been reached by many other courts throughout the Union. In these decisions, however, there is a general disposition to favor the marshalling of assets, so as to compel the joint creditors to resort, in the first instance, to the partnership funds; which, it would seem, in fairness and equity, ought to be done. In some cases, indeed, the rule in Tucker *v.* Oxley has been pushed too far; and in several States the subject has been regulated by statute. It would be impossible, in a treatise like the present, to enter minutely into these different decisions and legislative enactments. All that can be done is to state the English rule, and the rule in Tucker *v.* Oxley, with the theories upon which these two different doctrines appear respectively to be based.[1]

When a partnership creditor has acquired a legal priority in respect of the separate estate, such priority cannot be disturbed by the equities of the separate creditors. A judgment for a partnership debt, for example, is a lien upon the separate real estate of the partners; and priority acquired by virtue of that lien is a legal right which the equity of the separate creditors will not be permitted to interfere with.[2]

519. The Act of March 2d 1867, to establish a uniform system of bankruptcy throughout the United States, provides, in its thirty-sixth section, that where a firm has been declared bankrupt, the partnership assets are to be distributed in the first instance among the partnership creditors, and the individual assets among the separate creditors. The rule being thus regulated by statute, the difference between the views discussed above, becomes, of course, immaterial when partnership property comes to be distributed under the bankrupt law.[3]

[1] See notes to Silk *v.* Prime (*supra*), where the subject is elaborately discussed. See, also, Black's Appeal, 8 Wright, (Pa.) 503; Kuhne *v.* Law, 14 Rich. (Law), 18; Story on Partnership, § 376, and notes.

[2] Meech *v.* Allen, 17 N. Y. 302; Wilder *v.* Keeler, 3 Paige, 171; National Bank *v.* Sprague, 5 C. E. Green, 13, 30. In New Hampshire the rule is different; Jarvis *v.* Brooks, 3 Foster, 136; Note to Silk *v.* Prime, 2 Lead. Cas. Eq. 422. See further on this subject, Averill *v.* Loucks, 6 Barb. 470; McCulloh *v.* Dashiell, 1 Har. & Gill, 96; Mower *v.* Kip, 6 Paige, 88.

[3] See Brightly's Annotated Bankrupt Act, 74, 75, 76.

After the debts of the partnership have been paid, if there is any surplus it is, of course, divided among the partners, the due proportion of each being ascertained by an account.

520. Before leaving the discussion of the equitable remedy by partnership bills, one or two other matters connected with the general subject of partnership may properly be noticed.

It was stated above that the right to have partnership assets applied in the first instance to the payment of firm debts, is an equity, not of the firm creditors, but of the partners themselves.

It is a consequence of this doctrine that these creditors have no standing in equity to restrain any disposition of partnership assets until they have exhausted all their legal remedies. It is not until they have endeavored to enforce the collection of their debts by execution at law and failed, that they can have recourse to a bill in equity.[1] Such a proceeding is termed a creditors' bill, the general nature of which will be explained hereafter. By means of such a bill, after an execution has been returned unsatisfied, a creditor can restrain the fraudulent disposition of property which ought to be applied to the payment of his debt, or may reach any property which has been thus fraudulently disposed of.

521. The fact that partnership assets are to be applied in the first instance to the payment of firm debts, does not exempt them from liability to the separate debts of each partner, so far as that individual's interest is concerned, and subject to the equities of the other members of the firm.

A separate creditor of a partner has, therefore, a right to issue an execution against partnership effects, and levy upon and sell the separate interest of the debtor therein. The purchaser at such a sale does not acquire an absolute and entire interest in the goods sold, but only a right which is subject to the paramount right of the other partners to have them applied to the payment of the firm debts should the financial condition of the partnership require it, and also to any balance due by the debtor upon the settlement of accounts between himself and his copartners. In short, he has the right to call for an account.[2]

[1] Greenwood *v.* Brodhead, 8 Barb. S. C. 593; Am. note to Silk *v.* Prime, 2 Lead. Cas. Eq. 403 (4th Am. ed.).

[2] Story on Partnership, § 263; Am. note to Silk *v.* Prime, 2 Lead. Cas. Eq. 409. See, also, Taylor *v.* Fields, 4 Ves. 396; Bank *v.* Carrolton Railroad, 11 Wal. 628.

The principle is the same whether the transfer is the act of the party or the act of the law, and is applicable to a voluntary assignment for the benefit of creditors, or to a sale made by a partner individually in the ordinary course of business.[1]

Whether an injunction can be issued to restrain the separate creditor from proceeding to a levy and sale of the partnership goods, is a question upon which the authorities are somewhat conflicting. Where, however, the firm is insolvent, and, therefore, the separate creditor could gain nothing by his execution, there would seem to be much reason in holding that equity ought to interfere on behalf of the other partners.[2]

522. It sometimes happens that levies under executions issued at the suit of both joint and separate creditors are made simultaneously, and in such cases questions of no little difficulty frequently arise. The proper course for the sheriff to pursue in such cases would seem to be to sell under both writs in the order of time in which he received them, and leave the rights of the parties to be decided subsequently in equity.[3] This appears to be the course adopted in England.[4] The decisions in the United States upon this point are not uniform. In some States the method above stated has been approved. In others, the separate execution has been considered as superseded by the joint execution, and the separate creditor is consequently excluded. The English course would seem to be most conformable to principle; while the other view has convenience in its favor. When such a coincidence of executions occurs, the joint creditors would, perhaps, have the right to restrain the separate creditors by injunction if the firm is insolvent.[5]

When the separate interest of each and every partner is levied upon and sold for individual debts, it has been held that the purchaser will take the whole interest, and the partnership creditors can subsequently have no claim.[6] The equities of all

[1] Taylor *v.* Fields, 4 Ves. 396; McNutt *v.* Strayhorn, 3 Wright, (Pa.) 269. Note to Silk *v.* Prime, 2 Lead. Cas. Eq. 408.

[2] Am. note to Silk *v.* Prime. 2 Lead. Cas. Eq. 411 *et seq.*; Story's Eq. Jurisp., § 677.

[3] Am. note to Silk *v.* Prime, 2 Lead. Cas. Eq. 411 *et seq*

[4] Id.

[5] See Am. note to Silk *v.* Prime, 2 Lead. Cas. Eq. 411 *et seq.*, where the subject is discussed.

[6] Doner *v.* Stauffer, 1 Pen. & Watts, 198; Vandike's Appeal, 7 P. F. Sm 12.

the partners being swept away by the sale, the rights of the firm creditors necessarily fall with them. But if before such sale another levy is made under a partnership judgment, the purchase-money under such a levy will be applicable in the first instance to the payment of the partnership debts.[1]

523. It said that another instance in which equity affords relief in partnership cases where no remedy exists at law, is to be found in those cases in which there is a creditor firm and a debtor firm having a common member. It is well known that in such a case no common-law action would lie, as no person can be both plaintiff and defendant in the same suit. "But there is no difficulty" (it has been observed by a writer of the highest authority) "in proceeding in courts of equity to a final adjustment of all the concerns of both firms in regard to each other."[2] This is undoubtedly true when the affairs of either partnership have for any reason been brought into chancery for settlement. But it may be doubted, with due deference to the distinguished authority just cited, whether any remedy would exist even in equity for the simple collection of a debt due by one solvent firm to another having a common member.[3] The difficulty has in some States been removed by statute

524. It has been said, in a learned work, that there is a jurisdiction in equity similar to that exercised in cases of partnership, where mines and collieries are owned and worked by several persons in common.[4] But it would seem that where there is a joint undertaking to work a mine, that would be a partnership as to such working, though not as to the land, and would fall under the ordinary jurisdiction in partnership cases.[5] And so, also, where there was evidence that the whole property was intended to be used in the business, then the partnership would extend to the land. In the absence, however, of such an understanding there would appear to be no jurisdiction apart from that which exists between tenants in common.[6]

[1] See Coover's Appeal, 5 Casey, 9; Menagh *v.* Whitwell, 52 N. Y. 156.

[2] Story's Eq. Jurisp., § 680.

[3] See Article in American Law Review, vol. v., p. 47 (October, 1870).

[4] Adams's Doct. Eq. 247.

[5] See Decker *v.* Howell, 42 Cal. 642.

[6] See Roberts *v.* Eberhardt, Kay, 148.

CHAPTER VI.

CREDITORS' BILLS AND ADMINISTRATION SUITS

525. Creditors' Bills; are of two classes.
526. Creditors' Bills against a debtor during lifetime; inefficiency of common-law executions.
527. Nature and effect of the Equitable remedy.
528. Creditors' Bills of the second class. Administration suits.
529. Not of great importance in this country.
530. General course of proceeding in an administration suit.
531. Equitable Assets; doctrine of comparatively little importance.
532. Origin of the doctrine.
533. *Silk* v. *Prime.*
534. *Cook* v. *Gregson.*
535. Doctrine of Performance.
536. Covenant to settle, and subsequent purchase.
537. Covenant to pay, and subsequent intestacy.
538. Satisfaction; of debts by legacies.
539. Of legacies by legacies.
540. Of legacies by portions; of portions by legacies.

525. CREDITORS' bills are bills filed by creditors for the purpose of collecting their debts out of the real or personal property of the debtor, under circumstances in which the process of execution at common law could not afford relief. This equitable remedy may be made use of during the lifetime of the debtor, or after his death. Creditors' bills filed against the estate of a decedent, generally, though not necessarily, partake of the nature of administration suits, and will be considered in that connection. Creditors' bills of the first class—*i. e.*, against a debtor during his lifetime—are now to be noticed.

526. Creditors' bills of the first class may be defined to be bills filed by creditors who seek to satisfy their debts out of some equitable estate of the defendant, which is not liable to levy and sale under an execution at law, or out of some property which has been put beyond the reach of ordinary legal process.[1]

[1] See Newman *v.* Willetts, 52 Ill. 101. See, also, Hagan *v.* Walker, 14 How. 29; Trask *v.* Green, 9 Mich. 358; Botsford *v.* Beers, 11 Conn. 369; Weed *v.* Pierce, 9 Cowen, 722; Spader *v.* Davis, 5 Johns. Ch. 280; 20 Johns. 554; Bayard *v.* Hoffman, 4 Johns. Ch. 450; Webster *v.* Folsom, 58 Maine.

They may be also made use of for the purpose of obtaining discovery of the debtor's property.[1]

Bills of this description had their origin in the limited scope of the ordinary writs of execution. These writs, being common-law writs, were confined in their operation to legal interests. Equitable interests could be reached, if reached at all, in equity alone. It is true that the Statute of Frauds[2] gave legal execution against the real estate of which every person was seized in trust for the debtor at the time the execution was sued out. But this exception was obviously very limited in its operation, for it did not extend to chattels real, to trusts under which the debtor has not the whole interest, to equities of redemption, or to any equitable interest which had been parted with before execution sued out. This narrowness of the common-law remedy naturally led to a jurisdiction in equity to afford the necessary relief.

527. Upon a bill being filed in a proper case, the equitable property will be taken into the possession of the court by the appointment of a receiver; the party holding the legal estate will be restrained from interfering with the prosecution of the creditors' remedy; and in the case of an equity of redemption, the judgment creditor is suffered to redeem.[3]

Bills of this description are still made use of in England, although the efficacy of the common-law writs of execution has been much increased by legislation; and they are of very frequent occurrence in many of the United States. The threefold advantage of reaching property otherwise exempt, of setting

230; Warner *v.* Moran, 60 Id. 227; Dodge *v.* Griswold, 8 N. Hamp. 425; Barry *v.* Abbott, 100 Mass. 396; Lillard *v.* McGee, 4 Bibb, 165; Tripp *v.* Lowe, 2 Kelly, 304; Thurmond *v.* Reese, 3 Id. 449; Eliot *v.* Merchants' Exch., 14 Mo. App. 234 (a case of a seat in the Merchants' Exchange); Dargan *v.* Waring, 11 Alab. 988, 993; Dunphy *v.* Kleinsmith, 11 Wal. 614; Belcher *v.* Arnold, 14 R. I. 613; Tantam *v.* Green, 6 C. E. Green, 364; Hall *v.* Joiner, 1 S. Carolina (N. S.) 186; Turner *v.* Adams, 46 Missouri, 95; Farnsworth *v.* Strasler, 12 Ill. 482; Dodd *v.* Levy, 10 Mo. App. 121. As to obtaining priority by filing a creditor's bill, see Pallis *v.* Robinson, 73 Mo. 201.

[1] Newman *v.* Willets, 62 Ill. 101.

[2] 29 Car. II., c. 2, § 10.

[3] See Adams's Doct. Eq. 129; Smith and Wolf's Appeal, 104 Pa. St. 381, and Shamwald *v.* Lewis, 7 Sawyer C. C. Rep. 148. See, also, in this connection, Lippincott *v.* Evans, 35 N. J. Eq. 553, where the property was held *not* to be liable to a bill.

aside fraudulent conveyances, and of discovery, renders a creditors' bill a very effective instrument for the collection of debts.[1] The jurisdiction of a court of equity, it has been said,[2] to reach property of a debtor justly applicable to the payment of his debts, even where there is no specific lien on the property, is undoubted; it is a very ancient jurisdiction. And, again, it has been said that while courts of equity are not tribunals for the collection of debts, yet they afford their aid to enable creditors to obtain payment, when their legal remedies have proved to be inadequate.[3]

The leading authorities upon the subject in the United States may be said to be Spader *v.* Davis[4] and Bayard *v.* Hoffman.[5] In these cases Chancellor Kent, basing his opinion upon some early English decisions,[6] held that in cases of fraudulent alienation courts of equity ought to interfere, whether the property could be reached by execution at law or not. Since the time of these decisions the equitable remedy by creditors' bill has been extensively used in many of the United States, and its efficiency has been much increased in several States by statute; and in some instances the remedy is expressly specified in the grant of chancery powers to the courts.[7]

As this remedy is based upon the incapacity to obtain relief

[1] A patent right may be subjected by a bill in equity to the payment of a judgment debt of the patentee; Agar *v.* Murray, 105 U. S. 126; Gillett *v.* Bate, 86 N. Y. 87. See, however, under the Massachusetts statute, Carver *v.* Peck, 131 Mass. 291; and under the limited equitable jurisdiction of the Pennsylvania courts, Bakewell *v.* Keller, 11 Week. N. Cas. 300, where it was held that such a bill would not lie. See, moreover, Gilman *v.* Bell, 99 Ill. 144, where it was held that equity would not compel the donee of a power to execute it in his own favor at the instance of creditors.

[2] By Mr. Justice Field in The Public Works *v.* Columbia College, 17 Wall. 521.

[3] By Mr. Justice Harlan in Taylor *v.* Bowker, 111 U. S. 110.

[4] 5 Johns. Ch. 280; on appeal, *nomine* Hadden *v.* Spader, 20 Johns. 554.

[5] 4 Johns. Ch. 452.

[6] Taylor *v.* Jones, 2 Atk. 600; King *v.* Marissal, 3 Id. 192; Horn *v.* Horn, Ambl. 79. Of this last case, Lord Thurlow is reported to have said: "The opinion in Horn *v.* Horn is so anomalous and unfounded that forty such opinions would not satisfy me." Grogan *v.* Cooke, 2 Ball & Beat. 233. The reasoning of Lord Thurlow prevailed in the English law; and the consequence was, that it subsequently was found necessary to make *choses in action* liable to execution by statute. See, upon the subject, Green *v.* Keene, 14 R. I. 388.

[7] See Introduction, *ante*, pp. 23 to 28

at common law, it is incumbent upon the complainant, as a general rule, to show that he has exhausted his common-law remedies before resorting to equity.[1] This is generally done by showing that he has obtained a judgment, has issued execution, and that there has been a return thereon of *nulla bona*.[2] And these facts must be alleged in the bill to give the court jurisdiction, for otherwise it would not appear but that the party had a complete remedy at law.[3] This rule, though a stringent one, is nevertheless not without exceptions.[4]

The filing of a creditor's bill, and the service of process creates a lien in equity upon the effects of a judgment-debtor. It has been aptly termed an "equitable levy."[5] It may be filed by one creditor alone, or by one on behalf of himself and all others who choose to come in.[6]

Bills of this description are sometimes employed for the purpose of subjecting the separate property of married women to the payment of their debts.[7]

Still more frequently in modern times have creditor's bills, or bills in the nature of creditor's bills, been entertained for the

[1] Newman *v.* Willetts, 52 Ill. 101; Hall *v.* Joiner, 1 S. C., (N. S.) 136. See Suydam *v.* The N. W. Ins. Co., 1 P. F. Sm. 394; Page *v.* Heath, 6 Id. 223; Bickley *v.* Paul, 11 Phila. 257; Albright *v.* Herzog, 12 Ill. App. 557; Tyler *v.* Peatt, 30 Mich. 63; Bassett *v.* St. Albans Co., 47 Vt. 312.

[2] See Jones *v.* Green, 1 Wall. 332; Beck *v.* Burdett, 1 Paige, 305, 308; Brinkerhoff *v.* Brown, 4 Johns. Ch. 671; Williams *v.* Brown, Id. 682; McDermott *v.* Strong, Id. 687; Hendricks *v.* Robinson, 2 Id. 283; Brown *v.* Long, 1 Ired. Eq. 190; McNairy *v.* Eastland, 10 Yerg. 310, 319; Stone *v.* Manning, 2 Scam. 530; Manchester *v.* McKee, 4 Gilm. 511; Miller *v.* Davidson, 3 Id. 518; Dornmeel *v.* Ward, 108 Ill. 216; Reese *v.* Bradford, 13 Alab. 837; Webster *v.* Clark, 25 Maine, 313; Tappan *v.* Evans, 11 N. Hamp. 312; Allen *v.* Montgomery, 48 Miss. 106; Hamlen *v.* McGillicuddy, 62 Maine, 268 (as to sufficiency of special return amounting to *nulla bona*); note to Sexton *v.* Wheaton, 1 Am. Lead. Cas. 54, 55.

[3] Newman *v.* Willetts, 52 Ill. 101.

[4] See Turner *v.* Adams, 46 Missouri, 95; Payne *v.* Sheldon, 63 Barb. 169; Botsford *v.* Beers, 11 Conn. 369; Stephens *v.* Beal, Id. 319; Tappan *v.* Evans, 11 N. Hamp. 311; Merchants' Nat. Bank *v.* Paine, 13 R. I. 492; Conroy *v.* Woods, 13 Cal. 626; Bay *v.* Cook, 31 Ill. 336; Ticonic Bank *v.* Harvey, 16 Iowa, 141.

[5] Tilford *v.* Burnham, 7 Dana, 110; Miller *v.* Sherry, 2 Wall. 249.

[6] Hendricks *v.* Robinson, 2 J. C. R. 283. See Saxton *v.* Davis, 18 Ves. 78, 82.

[7] See Lillia *v.* Airey, 1 Ves. Jr., 277; Methodist Episcopal Church *v.* Jaques, 1 Johns. Ch. 450; Todd *v.* Lee, 15 Wis. 365; Kerr on Receivers, 57 (2d Am. ed.).

relief of creditors of insolvent corporations. The jurisdiction of courts of chancery in such cases may be placed partly on the advantages of the equitable remedy now under consideration and partly on the nature of corporate property. For it is well settled that in equity the capital stock of a corporation is a trust fund for the payment of its debts; and the liabilities of subscribers to capital stock and the dealings of stockholders with shares are, in equity, determined and regulated largely with reference to this fiduciary nature of the capital stock. The leading case upon the subject in this country may be said to be Sawyer *v.* Haag, decided by the Supreme Court of the United States in 1873.[1] This case has been followed by others in the federal tribunals; and similar decisions have been made in state courts.[2] But whatever the grounds of the jurisdiction may be, its existence is well established; and by bills in such cases, in the nature of creditor's bills, unpaid subscriptions to capital stock may be collected, the fraudulent disposition of corporate assets may be enjoined, and the administration of corporate property for the benefit of creditors and others may be secured.[3] The personal liability of directors may be enforced by such bills;[4] and, indeed, in some jurisdictions such liability is enforceable in equity alone.[5]

The subject was considered in the year 1886, by the Supreme Court of Pennsylvania in the Penn Bank *v.* Hopkins,[6] just cited, and the ruling of the court in that case, may be usefully referred to, not only because it reiterated the general doctrine that a creditor's bill may be maintained against the directors of an insolvent corporation for the mismanagement of its affairs, but also because it illustrates two of the points which not unfrequently arise in such cases. It there appeared that an insolvent corporation had made an assignment for the benefit of its cred-

[1] Sawyer *v.* Haag, 17 Wallace, 610.

[2] Among the authorities on this subject, are, Sawyer *v.* Upton, 91 U. S. 56; Hatch *v.* Dana, 101 Id. 205; County of Morgan *v.* Allen, 103 Id. 498; Crandall *v.* Lincoln, 52 Conn. 73; and Messersmith *v.* Sharon Savings Bank, 96 Pa. St. 440.

[3] See Lane's Appeal, 105 Pa. St. 49; Brown *v.* Fisk, 23 Fed. Rep. 228; Tunesma *v.* Shuttler, 114 Ill. 156; Rounds *v.* McCormick, Id. 252.

[4] Penn Bank *v.* Hopkins, 111 Pa. St. 328.

[5] Stone *v.* Chesholm, 113 U. S. 302; Chase *v.* Curtis, Id. 452.

[6] 111 Pa. St. 328.

itors, and that certain of the creditors had subsequently filed a bill against the directors of the corporation to which the assignee for the benefit of creditors was made a party defendant. It was held, in the first place, that the bill in equity prevented any suit at common law from being brought by the assignee, in the name of the corporation, against the directors for the same cause of action, and that the pendency of the creditors' bill was a good plea in abatement to the action at law. It was ruled in the second place, that where the wrong complained of is perpetrated by the directors themselves, it is not necessary to show that, before the bill was filed, there had been a demand upon the corporation to proceed and a refusal on its part to do so.[1]

528. Creditors' bills of the second class—*i. e.*, those which are filed after the death of the debtor—generally result in an administration of his estate, because the executor or administrator does not generally admit assets in his answer. If, however, assets are admitted, the debt of the creditor who files the bill will be collected, but there will be no decree for the general administration of the estate. In most cases, however, there is no admission of assets, and the court then goes on to ascertain what the assets are, to get them in, and to distribute them properly among creditors, legatees, and other parties interested. When bills for getting in and distributing the estate of a decedent are filed by legatees, they are termed administration suits. The principles which govern the action of the court in administration suits, and in creditors' bills where no assets are admitted, are the same and may be considered together. A bill for administration may also be filed by an executor or administrator, who (in England) could only obtain complete exoneration by having his accounts passed in chancery, and was, therefore, entitled to insist upon that protection.[2]

529. Bills for the administration of the estates of decedents are of much less importance, and of much less frequent occurrence, in this country than in England, as the distribution of

[1] Upon this last point, see, also, the cases cited under the head of Fraud by Directors and Promoters of Companies, *ante*, §§ 238 and 239.

[2] Adams's Eq. 257. See, also, Brown *v.* McDonald, 1 Hill C. R. 300; Adams *v.* Dixon, 19 Ga. 513.

such assets is, in most States, vested by statute in Probate or Orphans' Courts, or similar tribunals.[1] In some States, however, the jurisdiction of chancery by administration suits is expressly conferred upon the courts;[2] and in some instances the equitable remedy has to be invoked in order to meet cases which cannot be properly dealt with in other tribunals.[3] It will, therefore, be proper to state briefly the nature of this equitable remedy, and the doctrines which are generally incidental thereto.

530. Administration bills are usually filed by one or more creditors or legatees on behalf of all;[4] and the decree, on such bills, is for a general account of the debts, and for an account and application of the personal assets. If the personal estate should prove insufficient, a decree will be made against the realty.[5] The bill enures to the benefit of all the creditors who may come in and prove their debts under it, so as to prevent the running of the statute of limitations; but up to the time of the decree for an account, the suit is under the control of the creditor who has filed the bill. After the decree the case is different, as the fund is then in court, and the creditor who has filed the bill ceases to have absolute control of the suit.

Upon the filing of the executor's answer, the balance admitted therein to be in his hands, is ordered to be paid into court; and, if the circumstances warrant such a course, a receiver of the outstanding personalty, and the rents of the real estate, will be appointed.

[1] See Board of Public Works *v.* Columbia College, 17 Wal. 521.

[2] See Introduction, *ante*, p. 23 *et seq.*

[3] See Hagan *v.* Walker, 14 Howard, 33, where a bill was filed by a creditor of a deceased debtor against the administrator, and a party who was fraudulently holding property of the deceased, which, in equity, should have been applied to the payment of his debts. See, also, Fowler's Appeal, 6 Norris, 454; (where the subject is exhaustively discussed); Frey *v.* Demarest, 1 C. E. Green, 236; Dorsheimer *v.* Rorback, 8 Id. 52; Lupton *v.* Lupton, 2 Johns. Ch. 614; Paris *v.* Leachman, 20 Alab. 662; Ledyard *v.* Johnston, 16 Id. 548; Pratt *v.* Northern, 5 Mass. 95; Reader *v.* Speake, 4 S. Carolina, 393; Gould *v.* Hayes, 19 Alab. 438; Freeland *v.* Dazey, 25 Ill. 294; Carrington *v.* Didier, 8 Grat. 260; Sabel *v.* Slingluff, 52 Maryl. 132; Farrar *v.* Hazelden, 9 Rich. Eq. 336; Garner *v.* Lyles, 35 Miss. 184; Walker *v.* Morris, 14 Georgia, 323; Freeland *v.* Dazey, 25 Ill. 294; Brown *v.* McDonald, 1 Hill (Ch.) 300; Adams *v.* Dixon, 19 Geo. 513; Thompson *v.* Brown, 4 Johns. C. R. 619; McKay *v.* Green, 3 Id. 56. See Thompson *v.* Tappen, 5 Johns. Ch. 518, where an injunction to restrain a suit at law was refused.

[4] See Thompson *v.* Brown, 4 Johns. Ch. 616; Hazen *v.* Durling, 1 Green (Ch.) 133.

[5] See Adams's Doct. Eq. 258.

It sometimes happens that several administration suits are simultaneously instituted by creditors and legatees, and that actions at law are also brought against the executor by parties having claims against the estate. After a decree has been made in one of the administration suits, all the suits will be consolidated; and restraining orders will be issued,[1] preventing any creditor from proceeding further in his action at law.[2]

When the assets have been secured, and their administration undertaken by the court, the next step is their distribution.[3]

For this purpose a reference is directed to a master, by whom an account of the personal estate, the testamentary expenses, and the legacies is taken, and before whom the debts must be proved. A time is fixed by advertisement, within which all claims must be presented, upon the expiration of which the master reports the claims which have been established, and the court, by its decree on further directions, authorizes a distribution of the fund among them, and protects the personal representative from any future claim.[4]

531. As, under the equitable remedy of partnership bills, certain equitable doctrines were considered because their application was most frequent in cases of that kind; so, in treating of the subject of administration suits, it will be proper to notice one or two doctrines, originally peculiar to the court of chancery, which are, in such suits, most frequently invoked. These are the doctrines of Equitable Assets, of Performance, and of Satisfaction.

The doctrine of Equitable Assets is one which has never been extensively applied in the United States, and has lost its importance in England in consequence of the act of 1870,[5] by which it is provided that simple contract and specialty creditors are, in future, payable *pari passu* out of both legal and equitable assets.

[1] It is not now necessary to file an injunction bill; an order may be obtained in the administration suit.

[2] See Rhodes *v.* Arnsinck, 38 Maryl. 345.

[3] Adams's Doct. Eq. 260.

[4] Id. 262. The above brief statement of the course of an administration suit is principally taken from Adams. Reference may also be had to Williams on Executors, 2005 (7th Eng ed.).

[5] 32 and 33 Vic., c. 46.

But it is, perhaps, necessary to say a few words upon the subject of equitable assets, not only because in some States the doctrine may be, occasionally, of practical importance, but also because it furnishes an illustration of the effect which the influence of equitable principles has had upon general jurisprudence both in England and in this country.

532. In England the real, as well as the personal property of a decedent was originally liable for the payment of his debts. But under the influence of the Feudal system (one of the main objects of which was to transmit real estate in an unimpaired condition from the ancestor to the heir), the rule grew up that lands in the hands of the heir were not bound for the debts of the ancestor, unless there was some deed or writing under seal (called a special contract or specialty), by which the heir, as well as the ancestor, was in express terms charged or bound with the payment of the debt. In such a case the heir was liable, on the decease of his ancestor, to pay the debt or fulfil the contract, to the value of the land which had descended to him from his ancestor, but not further, and the lands so descended were termed *assets* by descent, from the French word *assez* (enough), because the heir was bound only so far as he had lands descended to him enough or sufficient to answer the debt or contract of his ancestor.[1] Moreover, if the heir was not expressly named in the obligation, the lands in his hands were not bound; and after the power of testamentary alienation of real estate was conferred by statute, a debtor who had bound his heir by a specialty became enabled to defeat his creditor by devising his estate to some other person than his heir, and in this case neither the heir nor the devisee was under any liability to the creditors. If, however, the ancestor, impelled by a sense of justice, devised the real estate to trustees for the payment of debts, or, what was the same thing, charged it with the payment of debts, the real estate then became trust property, and as such fell under the administration of the court of chancery. Now, it is one of the maxims of this court that "equality is equity;" and hence, when the real estate of a decedent came to be applied to the payment of his debts under the supervision of a chancellor, not only were the simple

[1] See Williams on Real Prop. 75; whence the above statement is taken.

contract debts held entitled to be paid out of the fund, but they were placed upon exactly the same footing as debts by specialty, in other words all the debts were payable *pari passu.*

By various statutes the injustice to creditors, which so long existed in the English law, was abolished, and the land of every debtor, which was not by his will charged with, or devised subject to the payment of his debts, was made assets for the payment of debts, reserving, however, to creditors by specialty in which the heir was bound the same priority which they originally possessed. It will be observed, however, that land expressly charged with or devised subject to the payment of debts was exempted from the operation of these statutes, and therefore still fell under the equitable maxim, already stated, that equality is equity. Hence there arose two classes of assets—first, legal assets, or those which by law (either common law or statute) were liable to the payment of debts, and in these the priority of specialty debts was preserved; and, secondly, equitable assets, or those which, being administered solely in the court of chancery, were applicable to the payment of all debts of whatever description *pari passu.* This distinction has been (as already stated) finally abolished by the statute of 1870.[1]

533. Before the passage of the statute of 1870, the doctrine of equitable assets occupied a very considerable place in the attention of English chancellors, and the cases by which the doctrine was illustrated and explained are quite numerous. In the present condition of the law, it is conceived that it will be sufficient to notice two of them only. In Silk *v.* Prime[2] (one of a few judgments of Lord Camden, as chancellor, which have come down to us well reported) the testator, Christopher Thomson, directed the defendants Prime and Moxon (whom he afterwards constituted his executors) to sell his real estate or such parts thereof as should, with his personal estate, be sufficient to pay all his just debts, and to apply the money arising therefrom, together with the money arising from his personal estate, for the payment of all his just debts. It was argued that as the testator had united both funds together in the hands of his

[1] A sketch of the doctrine of equitable assets will be found in Benson *v.* Le Roy, 4 Johns. Ch. 651.

[2] 1 Bro. C. C. 138 n.; 2 Lead. Cas. Eq. (4th Eng. ed.) 111.

trustees and executors, both must be one consolidated fund to follow one course of administration; but the Lord Chancellor said "the answer is, that in all cases where the trustee and executor is one person the funds are consolidated in the same manner, for out of both he is to pay all his debts; but the course of administration is different, and by this very method it is, that the court is enabled to pay all the debts without distinction, as far as the assets will go, and by marshalling both kinds of assets, makes them amicably combine to answer the full intention of the testator."

534. In a more modern case the doctrine of equitable assets was thoroughly considered by Vice-Chancellor Kindersley, and his opinion has been justly regarded as a most clear and learned explanation of the difference between the two kinds of assets.[1] "The general proposition," said that learned judge, "is clear enough, that, when assets are made available in a court of law, they are legal assets; and when they can only be made available through a court of equity, they are equitable assets. This proposition does not, however, refer to the question whether the assets can be recovered by the executor in a court of law or in a court of equity. The distinction refers *to the remedies of the creditor, and not to the nature of the property.* The question is not whether the testator's interest was legal or equitable, but whether a creditor of the testator seeking to get paid out of such assets, can obtain payment thereout, from a court of law, or can only obtain it through a court of equity;" and the vice-chancellor then went on to say that legal assets were such as the executor would have a right to recover, merely *virtute officii, i. e.*, which he would have had a right to recover if the testator had merely appointed him executor, without saying anything about his property or the application thereof. Other assets are, of course, equitable assets.

It has been already observed that the doctrine of equitable assets is of little or no importance in this country as a head of chancery jurisprudence, owing to the fact that it has been adopted and incorporated into the statute law of most of the States; in other words, that the debts of decedents are generally

[1] Cook *v.* Gregson, 3 Drew. 549.

paid *pari passu*, subject to some few preferences which have been introduced by statute, and which vary in different States. It has, therefore, been thought sufficient to give a very general explanation of the doctrine; and to refer to the two leading cases cited above.[1]

The assets of the decedent having been got in, they are applied to the payment of the debts and legacies. The order in which assets are, as a general rule, to be applied to the payment of debts, has been attempted to be explained in a former chapter.[2] This order, however, together with the order in which debts are to be paid, is the subject of statutory regulation in most of the States.

535. In applying the assets to the payment of debts and legacies certain equitable doctrines are occasionally invoked, which have not been hitherto explained and which should therefore be briefly noticed. These doctrines grow out of the general equitable principles that equity imputes an intention to fulfil an obligation, and that equity leans against double portions; and they are known by the names of "Performance" and "Satisfaction."

The doctrine of Performance is applied (first) where there is a covenant to purchase and settle land, and a purchase is made not expressed to be made in pursuance of such covenant, and no express settlement is made; and (secondly) where there is a covenant to *leave* property, and the covenantee receives a share under an intestacy.[3]

536. Upon the first branch of this doctrine the leading authorities are Lechmere *v.* The Earl of Carlisle,[4] and Wilcocks *v.* Wilcocks.[5] From these cases and from subsequent authori-

[1] A few of the cases which have occurred in the United States upon the general subject are Benson *v.* Le Roy, 4 Johns. Ch. 651; Stagg *v.* Jackson, 1 Comst. 206; Torr's Estate, 2 Rawle, 250; Walker's Estate, 3 Id. 229; Agnew *v.* Fetterman, 4 Barr, 56; Hoover *v.* Hoover, 5 Id. 357; Cadbury *v.* Duval, 10 Id. 267; Baldy *v.* Brady, 3 Harris, 103; Sperry's Estate, 1 Ashm. 347; Cornish *v.* Wilson, 6 Gill, 303; Backhouse *v.* Patton, 5 Peters, 160; Henderson *v.* Burton, 3 Ired. Ch. 259; Helm *v.* Darby's Admrs., 3 Dana, 185; Cloudas's Ex'r. *v.* Adams, 4 Id. 603; Speed's Ex'r. *v.* Nelson's Ex'r., 8 B. Mon. 499; Bull *v.* Bull, Id. 332.

[2] *Ante*, § 346 *et seq.*

[3] Snell's Prin. of Eq. 193 (3d ed.).

[4] 3 Peere Wms. 227; Cas. temp. Talbot, 80.

[5] 2 Vern. 558; 2 Lead. Cas. Eq. 415.

ties it has usually been considered that the following propositions may be deduced:—

First. That when a person covenants to purchase and settle lands of a certain value, and afterwards purchases lands of an equal or greater value which descend to his heir, it will be deemed a performance of the covenant.

Second. Where the lands purchased are of less value than the lands covenanted to be purchased or conveyed and settled, they will be considered as purchased in part performance of the covenant.

Third. Where the covenant points to a *future* purchase of land, it cannot be presumed that lands of which the covenantor was seised at the time of the covenant, descending to his heir, were intended to be taken in part performance of it.

Fourth. It cannot be presumed that property of a different nature from that covenanted to be purchased by the covenantor, was intended as a performance.

Fifth. The absence of the required consent of the trustee of the settlement will not rebut the presumption of performance, if other circumstances are favorable.[1]

537. Under the second branch (above stated) of the doctrine of Performance, the cases are usually those in which a husband covenants to pay his wife a sum of money, and then dies intestate, so that she becomes entitled under the statute of distributions. In such cases if the death of the husband occurs at or before the time when the covenant should have been performed, the share of the widow will be considered as a performance *pro tanto* or *in toto*, according as it is less than or equal to the sum covenanted to be paid;[2] but if the death of the husband is *after* a breach of the covenant has occurred, the widow's share will not be considered as a performance.[3]

Questions of this kind arise principally under marriage articles in England; and have received little, if any, judicial interpretation in this country.

538. Where one person is under some legal or moral obliga-

[1] See Snell's Principles of Equity, 188; notes to Wilcocks *v.* Wilcocks, 2 Lead. Cas. Eq. 415.

[2] Blandy *v.* Widmore, 1 P. Wms. 324; Goldsmid *v.* Goldsmid, 1 Swanst. 211.

[3] Oliver *v.* Brickland, cited in 3 Atk. 420.

tion to another, and under those circumstances makes a gift of such a nature that it operates as an exact fulfilment of the obligation, there arises a presumption that it was the intention of the donor to discharge the obligation by making the gift; in other words, the gift is presumed to be in satisfaction of the obligation, and hence this presumption, which had its origin in courts of chancery, has given rise to what is known in equity as the doctrine of Satisfaction.

This doctrine has been usually, and doubtless justly, supposed to have been borrowed from the civil law; but it is one which has been frequently regarded with no little disfavor, and hence the presumption upon which it is founded has been always considered liable to be rebutted by slight circumstances. The doctrine being founded on the presumed intention of the donor, evidence of his express intention is admissible; and presumptions are also drawn from surrounding circumstances, by which the supposed intention that the gift should operate as a satisfaction, may be contradicted or controlled.

The cases in which the doctrine of satisfaction has been applied have nearly all arisen under wills; and the subject, for the purposes of convenient consideration, may be divided into the satisfaction of debts by legacies; of legacies by subsequent legacies; of legacies by portions; and of portions by legacies.[1]

And, first, of the satisfaction of debts by legacies. It is a general rule, both in England and in this country, that a legacy given by a debtor to his creditor, which is equal to or greater in amount than the debt, shall be presumed to be intended as a satisfaction of the debt; but it must be not only equal in amount, but equally beneficial and of the same nature exactly.[2] It will be observed that this statement of the rule both indicates the general doctrine, and also suggests some considerations by which its application may be controlled.

Chancey's case and Strong *v.* Williams may be cited as authorities in which the general doctrine is admitted, and at the same time several of its qualifications illustrated.[3] In the former

[1] See Snell's Equity, 194, whence the division in the text is taken.

[2] 2 Spence Eq. 605.

[3] Chancey's Case, 1 P. Wms. 408; 2 Lead. Cas. Eq. (4th Eng. ed.) 380; Strong *v.* Williams, 12 Mass. 391; American note to Chancey's Case, 2 Lead. Cas. Eq. 782 (4th Am. ed.).

case a person indebted to his servant for wages, in the sum of 100*l.*, gave her a bond for that sum, and afterwards by will gave her 500*l.* for her long and faithful services, and directed that all his debts and legacies should be paid; in the latter, the testator gave a bond to his housekeeper conditioned for the payment of $333 within six months after his decease, and also a written promise to pay her $20 annually; and he afterwards in his will bequeathed her a pecuniary legacy of $300, together with furniture and other chattels valued at $745; and he devised the residue of his estate subject to the payment of debts and legacies. In both of these cases the general doctrine of satisfaction was recognised;[1] but in both its application was refused, in Chancey's case, because the intention to satisfy the debt by the legacy was supposed to be rebutted by the express direction that debts *and* legacies should be paid; and in Strong *v.* Williams, not only for the reason in Chancey's case, but also because the pecuniary legacy was less than the amount of the debt, and the specific legacy was of a different *nature*. From these and from other authorities, it will be observed that the presumption of satisfaction will only arise where the amount of the legacy is equal to or greater than that of the debt; and where its *nature* is the same; but that this presumption is liable to be rebutted by any circumstances, to be gathered from the will, or from other sources, showing an *intention* on the part of the testator that a satisfaction should not take place.

Where a creditor gives a legacy to a debtor there is no independent presumption, either at law or in equity, that the legacy is meant as a forgiveness of the debt; such a construction must be established by affirmative proof.[2]

539. The question of the satisfaction of a legacy by a legacy, may arise either when the second legacy is given by a different

See, also, Wathen *v.* Smith, 4 Mad. 325; Clark *v.* Sewell, 3 Atk. 96; Dey *v.* Williams, 2 Dev. & Bat. Eq. 66; Byrne *v.* Byrne, 3 Serg. & Rawle, 54; Van Riper *v.* Van Riper, 1 Green, (Ch.) 1; Parker *v.* Coburn, 10 Allen, 82; Wesco's Appeal, 2 P. F. Sm. 195; Horner's Ex'tr. *v.* McGaughy, 12 Id. 189.

[1] In Chancey's Case, while Lord Chancellor King admitted the existence of the doctrine, and declined to overturn it, he by no means approved of it.

[2] Story's Eq. Jurisp., § 1123: Am. note to Chancey's Case, 2 Lead. Cas. Eq. 828 (4th Am. ed.).

instrument, or when both legacies are given by the same instrument. The rules by which the question is to be determined in cases where the two legacies are given by different instruments, were stated by Mr. Justice Ashton in the leading case of Hooley *v.* Hatton, decided in 1773, to be (in substance) as follows:—

1. Where there is no internal evidence furnished by the instruments themselves, the general rules of law must be referred to.

2. Where the same specific thing is given twice, it can take place but once.

3. Where the like quantity is given twice, the legatee is entitled to both.

4. When the second legacy is of a less amount, the legatee will take both.

5. When the second legacy is of a larger amount, it is an augmentation, and the legatee will take both.[1]

Perhaps a still more accurate and philosophical statement of the law is to be found in Hurst *v.* Beach,[2] where Sir John Leach said that "where a testator leaves two testamentary instruments, and in both has given a legacy *simpliciter*[3] to the same person, the court, considering that he who has twice given must, *prima facie*, be intended to mean two gifts, awards to the legatee both legacies, and it is indifferent whether the second legacy is of the same amount, or less, or larger than the first; but if in such two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given, the court considers these two coincidences as raising a presumption that the testator did not by the second instrument mean a second gift, but meant only a repetition of the former gift; the court raises this presumption only where the double coincidence occurs of the same motive and the same sum in both instruments; it will not raise it, if in either instrument there be no motive, or a different motive expressed, although the sums be the same; nor will it raise it if the same motive be expressed in both instruments, and the sums be different." The rules upon the subject

[1] Hooley *v.* Hatton, 1 Bro. C. C. 390, n.; 2 Lead. Cas. Eq. 346 (4th Eng. ed.).

[2] 5 Madd. 351–358.

[3] That is with no expression of the motive of the gift.

as thus stated have been expressly approved in a modern case by Sir James Bacon, V.-C., whose judgment was subsequently affirmed by the Court of Appeals.[1]

On the other hand, where legacies of quantity in the *same* instrument are given to the same person *simpliciter*, and are of equal amount, one only will be good; nor will small differences, in the way in which the gifts are conferred, afford internal evidence that the testator intended that they should be cumulative. Thus in Greenwood *v.* Greenwood, the testatrix gave "to her niece, Mary Cook, the wife of John Cook, 500*l.*," and afterwards, in the same will, amongst many other legacies, "to her cousin, Mary Cook, 500*l.*, for her own use and disposal, notwithstanding her coverture." It was held that Mary Cook was entitled to but one legacy of 500*l.*, and that the same was to her separate use.[2]

Where, however, the legacies given by the same instrument are of unequal amount, they will be considered cumulative.[3]

The general principles stated above have been approved in New York by Chancellor Kent;[4] and in other States of the Union in several decisions.[5]

540. As to the satisfaction of legacies by portions, or portions by legacies, the general doctrine is that there is a presumption against double portions, whenever the relation between the parties is that of parent and child, or wherever the donor stands in *loco parentis* towards the donee; but that no such presumption exists when the parties are mere strangers. The leading authority upon this subject is Ex parte Pye, decided by Lord Eldon in 1811, where the general presumption against double portions was recognised, and the exception in the case of strangers applied. The general rule there laid down, as well as the excep-

[1] Wilson *v.* O'Leary, L. R., 12 Eq. 525; 7 Ch. 448.

[2] Greenwood *v.* Greenwood, 1 Bro. C. C. 31 n.; Snell's Principles of Equity, 198.

[3] Curry *v.* Pile, 2 Bro. C. C. 225; Snell's Prin. of Eq. 198.

[4] Then Chief Justice; see Dewitt *v.* Yates, 10 Johns. 156.

[5] Jones *v.* Creveling's Ex'rs., 4 Harrison, 127; Creveling's Ex'rs., *v.* Jones, 1 Zab. 573; Minor *v.* Ferris, 22 Conn 371.

[6] Ex parte Pye, 18 Ves. 140; 2 Lead. Cas. Eq. 365 (4th Eng. ed.).

tion upon which the case was decided, has been since recognised both in England and in this country.[1]

It has been thought proper to notice the general doctrines of performance and satisfaction in connection with the subject of administration suits, and suits by legatees, because such questions most frequently arise in bills of this kind. The statement of these doctrines has necessarily been an exceedingly brief one; for a more elaborate examination of the authorities would be out of place in a general treatise upon the Principles of Equity, and would more properly be found in a treatise upon Wills.

CHAPTER VII.

INFANTS, IDIOTS AND LUNATICS.

541. Protection afforded to the persons and estates of infants at common law, and by statute.
542. Necessity for, and origin of the jurisdiction of the chancellor.
543. Infant is made a ward of court.
544. To be made a ward of court the infant must have property.
545. Proceedings may be by petition as well as by bill.
546. Appointment and removal of guardians; custody of infants.
547. Guardianship a father's *duty*, not a *privilege*.
548. Education of the ward.
549. Management of his estate.
550. Marriage of the ward.
551. Nature and origin of the jurisdiction of the chancellor over lunatics and idiots.
552. Statute of Edward II.
553. Subject generally regulated by statute in the United States.
554. Method of procedure in lunacy.
555. Appointment and powers of committee.

541. It is essential to every well ordered social system that there should exist some judicial authority by which protection may be afforded to those who cannot protect themselves; in other words, that there should be some tribunal whose duty it is to supervise the care of the persons and estates of infants, idiots and lunatics.

In the case of infancy, this result was partially attained at common law by the guardianships of different kinds which

[1] See notes to Ex parte Pye, 2 Lead. Cas. Eq. 782 (4th Am. ed.).

existed under that system of jurisprudence, and to which the care of the infant's person and the management of his estate were intrusted; while in case of a breach of the guardian's duty, either by wasting the estate of the ward, or by cruelty to his person, redress was afforded by proceedings in the criminal courts, or by an action of account at law, according to the nature of the case. The writ of *habeas corpus*, moreover, was available for the purpose of rescuing the ward from illegal custody, and restoring him to his proper guardian.[1]

Additional protection to the persons and estates of infants was also afforded, in England, by the provisions of the statute of Charles II., by which the father of an unmarried infant was enabled to appoint a guardian by deed or will, the appointment being good against all persons claiming as guardians in socage or otherwise.[2] Similar statutes exist in nearly all, or perhaps *all*, of the United States; and, moreover, in most of the States of the Union, the custody of the person of the minor and the management of his estate, and all matters appertaining to the appointment, removal or discharge of guardians, and the settlement of their accounts, are intrusted by statute to Orphans' Courts, Surrogate's Courts, Courts of Probate, or other similar tribunals which have been constituted for the protection and administration of the estates of decedents.

542. Notwithstanding these common-law and statutory provisions, there still existed in England a necessity for the interference of some other tribunal; for many cases necessarily arose in which a sufficient control over the guardian or a proper care of the ward's estate, could not be secured in the common-law courts; nor could those courts possibly exercise a continuous supervision over the maintenance and education of the minor, and over the conduct of the guardian. Hence, for these purposes, there has been considered to exist in England, a prerogative in the Crown, as *parens patriæ*, to be exercised by the court of chancery, for the protection of any infant residing temporarily or permanently within its jurisdiction. And in the United States, also, although owing to the existence of special tribunals, the occasions for the exercise of this head of chancery jurisdic-

[1] See Massee *v.* Snead, 29 Ga. 51. [2] 12 Car. II., c. 24, § 8.

tion, are not nearly so frequent as in England, cases still arise in which equitable interposition is necessary;[1] and not only has it been held that the power to protect the persons and estates of minors is embraced in every general legislative or constitutional grant of chancery powers,[2] but it has also been decided that wherever a court of chancery of general jurisdiction exists, testamentary and statutory guardians are as much under its superintendence and control, as guardians in socage at common law.[3]

While, therefore, it would be out of place to enter into an elaborate discussion upon the relation of guardian and ward, and upon the rights and duties to which that relation gives rise, it will, nevertheless, be proper to state briefly the nature of the jurisdiction of chancery upon this subject, and the manner in which the court acts in thus attempting to remedy the deficiencies of the common law.

543. The general theory upon which chancery assumes jurisdiction over the persons and estates of minors is, that, by proper proceedings, the infant has been constituted a ward of court.[4] Almost every court has the authority to protect the interests of an infant party by appointing a guardian *ad litem*, whose duties will relate only to the particular subject in controversy; but the action of the court of chancery in constituting a minor a ward of court, has a wider scope, and extends to the general care and protection of his person and estate.

544. Two points require, perhaps, to be noticed in the first instance. These are (first) that the court must, it is said, when it constitutes a minor a ward of court, have some property of the infant; and (secondly) that the application to the court may

[1] Aymar *v.* Roff, 3 Johns. Ch. 49; Cowls *v.* Cowls, 3 Gilman, 435; Am. note to Eyre *v.* Countess of Shaftesbury, 2 Lead. Cas. Eq. 1517 (4th Am. ed.).

[2] McCord *v.* Ochiltree, 8 Blackf. 15; Maguire *v.* Maguire, 7 Dana, 181. "The court of chancery," said Mr. Justice Nelson, in Williamson *v.* Berry, 8 How. 555, "possesses an inherent jurisdiction which extends to the care of the persons of infants so far as is necessary for their protection and education, and also to the care of their property, real and personal, for its due management and preservation, and proper application for their maintenance."

[3] Matter of Andrews, 1 Johns. Ch. 99; Ex parte Crumb, 2 Id. 439.

[4] See Williamson *v.* Berry, 8 How. 531.

be by petition as well as by bill.[1] The first of these rules was thus stated by Lord Eldon: "It is not from any want of jurisdiction that it (the court) does not act (where it has no property of an infant) but from a want of the means to exercise its jurisdiction, because the court cannot take upon itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only where it has the means of doing so; that is to say by its having the means of applying property for the use and maintenance of the infant."[2] In practice, however, the operation of this rule would seem to be easily evaded. Thus it often occurs that a bill is filed for the sole purpose of making an infant a ward of chancery; and in such a case the bill always states that the infant has property whether the fact be so or not, and that the bill is brought against the person in whose supposed power or custody the property is.[3] And an infant may be constituted a ward of court although all the property and the actual domicile of the infant is in a foreign jurisdiction, and the infant is only temporarily within the jurisdiction of the court.[4]

In Cowls *v.* Cowls[5] the jurisdiction of the court was made available in spite of the want of property, through the medium of an order requiring the father to pay a small sum annually for the maintenance of the infants; while the language of some of the decisions would seem to place the authority of the court, in part at least, upon the simple theory of protecting the infant from cruel treatment, or from an abuse of parental authority.[6] The necessity, therefore, for the existence of property as a prerequisite to the exercise of the jurisdiction of the court, would seem to be more of a legal fiction than a reality.[7]

[1] See notes to Eyre *v.* Countess of Shaftesbury, 5 Lead. Cas. Eq. 645 (4th Eng. ed.).

[2] Wellesley *v.* The Duke of Beaufort, 2 Russ. 21; s. c., 2 Bligh, (N. S.) 128.

[3] Johnstone *v.* Beattie, 10 Cl. & Fin 42; Story's Eq. Jurisp., § 1351.

[4] Id.

[5] 3 Gilman, 435.

[6] Maguire *v.* Maguire, 7 Dana, 181; Am. note to Eyre *v.* Countess of Shaftesbury, 3 Lead. Cas. Eq. 272 (3d Am. ed.).

[7] The authority of the court of chancery in England to make orders touching the custody of infants under seven years of age is much enlarged by Stat. 2 & 3 Vic., c. 54, § 1. See Warde *v.* Warde, 2 Phillips, 786; note to Eyre *v.* Countess of Shaftesbury, 2 Lead. Cas. Eq. 690 (4th Eng. ed.).

545. In the second place, as to the manner in which a minor may be constituted a ward of court, it is not necessary that there should be any suit actually instituted or bill filed; the object may be attained by petition; and even an order in chambers for the maintenance of an infant, out of the income of a legacy, upon a summons taken out in her name by her guardian, has been held, without suit, to constitute the infant a ward of chancery.[1]

546. The jurisdiction of the court of chancery may be exercised either for the purpose of appointing a guardian where the infant has none, or for the purpose of settling conflicting claims to the guardianship, or for the purpose of removing the custody of the infant's person and the care of his property from the legal guardian, whether the guardian be by nature (as the father, for example) or by virtue of some statute.

The jurisdiction of the court of chancery to appoint a guardian, and, if necessary for that purpose, to interfere between a father and his children, is undoubted; and has been settled by the highest authority in England, and by many cases in this country.[2] Thus, where the habits and mode of life of the father, or his treatment of his child, are such as to affect injuriously the child's health or morals, or to endanger his property, the custody of the child will be committed to a person to act as guardian;[3] but mere insolvency of a father will not be a ground for taking his children from him;[4] and the court has refused to deprive a father, though living in adultery, of the custody of his child, where he did not bring the child in contact with the woman with whom he was so living.[5]

[1] In re Graham, L. R., 10 Eq. 530. See, also, 2 Lead. Cas. Eq. 681, 682 (4th Eng. ed.).

[2] Wellesley *v.* The Duke of Beaufort, 2 Russ. 1; 2 Bligh, (N. S.) 124; Wood *v.* Wood, 5 Paige, 596; In the Matter of Wollstonecraft, 4 Johns. Ch. 80; Miner *v.* Miner, 11 Ill. 43; Maguire *v.* Maguire, 7 Dana, 181; Story's Eq. Jurisp., § 1341.

[3] Creuze *v.* Hunter, 2 Cox, 242; Shelley *v.* Westbrooke, Jac. 266, n.; Anon., 2 Sim. N. S. 54; De Manneville *v.* De Manneville, 10 Ves. 62; Warde *v.* Warde, 2 Phillips, 786; Thomas *v.* Roberts, 3 De G. & Sm. 758; Whitfield *v.* Hales, 12 Ves. 492; In re Waldron, 13 Johns. 418; People *v.* Mercein, 8 Paige, 47; 25 Wend. 64; State *v.* Grigsby, 21 Am. L. Reg. N. S. 805. See 2 Lead. Cas. Eq. 685, 692 (4th Eng. ed.); and 2 Id. 1506 (4th Am. ed.).

[4] Kilpatrick *v.* Kilpatrick, Macphers. 143; In re Fynn, 2 De G. & Sm. 457; 2 Lead. Cas. Eq. 686 (4th Eng. ed.).

[5] Ball *v.* Ball, 2 Sim. 35. See, also, Commonwealth *v.* Addicks, 5 Binn. 520; and 2 S. & R. 174; State *v.* Baird, 6 C. E. Green, 384.

As in the case of a father, so *à fortiori* in the case of a testamentary guardian, will the court interfere in cases of improper conduct or character.[1] But it seems, that, both in the case of a father and of a testamentary guardian, the court will not appoint another guardian, but will simply appoint a person to *act as guardian*.[2]

547. The guardianship of his children is not a privilege of the father, but it is a *duty* cast upon him by considerations of public welfare. He cannot, therefore, by any contract relieve himself from the responsibility of discharging this duty; and hence, it must now be considered as settled (at all events in England) that contracts by a father to give up to his wife the custody and education of their children, are contrary to public policy, and will not be enforced in equity against the husband; and this, although the husband may have been guilty of adultery and of cruelty to his wife.[3] There may, however, be such cases of gross misconduct on the part of the father, as will unfit him for the custody of his children.

548. Supposing, now, that the court has assumed the care of the person and property of the infant, the next question for consideration is, in what particulars will the jurisdiction of the court be exercised? These are usually said to be three, viz., first, the education of the infant; second, the management of the estate; and third, the marriage of the ward.

The guardian will be allowed to regulate the mode and select the place for his ward's education, and the obedience of the ward will be enforced by the court;[4] and where guardians differ as to the mode of education, the court will decide.

In regard to matters of religious belief the court will usually respect the creed and opinions of the father, and even in England, the court will not control a guardian in bringing up a child in

[1] Duke of Beaufort *v.* Berry, 1 P. Wms. 704; Smith *v.* Bate, 2 Dick. 631; 2 Lead. Cas. Eq. 692.

[2] Ex parte Mountfort, 15 Ves. 446; 2 Lead. Cas. Eq. 685, 692, 693.

[3] 2 Lead. Cas. Eq. 671 (4th Eng. ed.).

[4] In Tremain's Case, 1 Strange, 168, the minor went to Oxford contrary to the orders of his guardian, who would have him go to Cambridge, and the court sent a messenger to carry him from Oxford to Cambridge; and upon the minor's return to Oxford, "there went another messenger, *tam* to carry him to Cambridge, *quam* to keep him there." See, also, 2 Lead. Cas. Eq. 694, notes (4th Eng. ed.).

a faith different from that of the established church, if it be the religion of the father.[1] The subject is, however, in the discretion of the court, and the general rule may be modified by peculiar circumstances.[2]

In general the court will not allow its wards to be taken out of its jurisdiction; but this rule is subject to exceptions when the health of the ward or other peculiar circumstances render it necessary.[3]

549. As to the management of the estate of the ward, it is, of course, directed for the end designed by the testator or settlor (if any) from whom the property may have been derived; and the duties of the guardian as to the care and investment of the estate are regulated very much by the general rules applicable to other trustees. Questions upon this subject, generally, have respect to the proper maintenance of the ward, and the sums which are to be appropriated for that purpose. Regard must be had to the condition and prospects of the ward, and to his rank in life; and while usually the income only (or a portion thereof) will be applied to his education and maintenance, the rule is not an invariable one, and in some instances the capital has been allowed to be broken in upon.[4]

The power of the court of chancery over the property of its ward extends only to the personal property, and the income of the real estate; the court having no inherent power to direct a sale of the real estate for the purposes of maintenance or education. That is a power which rests exclusively with the legislature.[5] In most of the United States, however, the courts which have control of the estates of minors are vested with authority

[1] Talbot *v.* The Earl of Shrewsbury, 4 My. & Cr. 672; Hawksworth *v.* Hawksworth, L. R., 6 Ch. 539; Austin *v.* Austin, 34 Beav. 257; In re Newberry, L. R., 1 Ch. 263.

[2] See Stourton *v.* Stourton, 8 De G., M. & G. 760; Hawksworth *v.* Hawsworth, L. R., 6 Ch. 543, 544; Andrews *v.* Salt, 8 Id. 622.

[3] 2 Lead. Cas. Eq. 698 (4th Eng. ed.).

[4] In the matter of Bostwick, 4 Johns. Ch. 101; and see notes to Eyre *v.* Countess of Shaftesbury, 2 Lead. Cas. Eq. 1503, 1504, 1505.

[5] Williamson *v.* Berry, 8 Howard, 495, 531; 2 Lead. Cas. Eq. 1504 (4th Am. ed.). See, also, Rogers *v.* Dill, 6 Hill, 415; Rivers *v.* Durr, 46 Alab. 418; Kearney *v.* Vaughan, 50 Miss. 284; Faulkner *v.* Davis, 18 Grat. 651. See, however, Bulow *v.* Witte, 3 S. Carolina (N. S.), 308; Matter of Salisbury, 3 Johns. Ch. 347; Huger *v.* Huger, 3 Dessaus. 18.

to order a sale of real estate when it is necessary and proper, and for the benefit of the infant.

The court may order personal property of the infant, where it is for his benefit, to be invested in land; but the order authorizing such investment will be coupled with a declaration that the land shall be considered, during the minority, as constructively personal.[1]

550. The last point upon which the court exercises its jurisdiction over wards of court is for the purpose of controlling their marriage. In the case of wards of the court, whether male or female, even when they have parents living, or guardians, it is necessary to apply to the court by petition for leave for them to marry, which will only be granted upon its appearing that the marriage is suitable, and the settlement proposed is proper, and the court will prevent, as far as it can, a clandestine marriage, by ordering that the ward shall not be married without the leave of the court, and that the person desirous of marrying the ward shall not have access by letter or otherwise. A person marrying a ward of court, or contriving or assisting such a marriage, without the leave of the court, will be guilty of a contempt of court, and will be punished accordingly; and it seems that ignorance of the fact that the infant is a ward of court, although it may be used in mitigation, will not acquit the party of the contempt.[2]

The guardianship of chancery over infants extends to the age of twenty-one. An infant, in chancery, is not entitled, as of course, on arriving at the age of fourteen, to select a new guardian.[3] In the case of a female ward, however, the guardianship terminates with marriage.[4]

551. Having considered the jurisdiction of the chancellor over the persons and estates of infants, the next subject which most naturally demands attention, is that of the analogous equitable relief which is afforded in the case of persons *non compotes mentis*.[5]

[1] Ashburton *v.* Ashburton, 6 Ves. 6; Ex parte Phillips, 19 Ves. 123.

[2] See 2 Lead. Cas. Eq. 703.

[3] In re William Nicoll, 1 Johns. Ch. 25.

[4] Eyre *v.* Countess of Shaftesbury, 1 Ves. 160; Matter of Whitaker, 4 Johns. Ch. 380.

[5] This term properly includes not only lunatics, but persons of weak and feeble understanding. Such persons may have committees appointed by

It has been stated in a former part of this treatise,[1] that the jurisdiction of the English court of chancery, in the case of lunatics and idiots, was peculiar in this respect—viz., that it was not exercised in a regular suit, but by the chancellor personally, on petition, and that the appeal from his order is to the king in council and not to the House of Lords. This resulted from the fact that the authority of the chancellor did not exist by virtue of his office, and as a part of his general, extraordinary jurisdiction, but was derived, by special authority, from the sovereign in whom, as *parens patriæ*, the care of idiots and lunatics was vested. This authority of the king not only existed at common law, but was also increased or affected by several statutes of an early date, which vested in him the profits of the land of an idiot, during the idiot's life, as a beneficial interest, and imposed upon him the duty of keeping the lands and tenements of lunatics without waste.[2] In the case of a lunatic, therefore, the king was a mere trustee.

552. Before the statute *de prerogativa regis*,[3] the custody of the persons and lands of such idiots as were possessed of lands was in the lord of the fee, and in case the idiot had no land, he fell under the care of the king, as the general *custos* of all those who had no other guardian. By the statute just mentioned, the custody of the persons and land of idiots was taken from the lord, and entrusted to the king, to whom (as already stated), a beneficial interest in the idiot's land was given. On the other hand, the statute 17 Ed. II., c. 10, as to lunatics, was a restraining statute, as it prescribed the duties of the king, and constituted him a trustee.

Before and since these statutes, the king has exercised his control over the persons and estates of idiots and lunatics by delegating his authority, by sign-manual, to some great officer, usually (though not necessarily) the holder of the great seal.[4] The effect of the delegation of authority, under the sign-manual,

courts of chancery to take charge of their persons and estates by a commission *in the nature* of a writ *de lunatico inquirendo*. See Matter of Barker, 2 Johns. Ch. 234, where the subject is examined by Chancellor Kent. See, also, Gibson *v.* Jeyes, 6 Ves. 273; Ridgeway *v.* Darwin, 8 Id. 66; Ex parte Cranmer, 12 Ves. 445.

[1] Introduction, *ante*, p. 49.

[2] Stats. 17 Ed. II., c. 9; Id. c. 10.

[3] Stat. 17 Ed. II., c. 9.

[4] See Wigg *v.* Tyler, 2 Dickens 553.

was merely to give the chancellor power to grant the custody of the lunatic; but after the court of chancery became well established, successive holders of the great seal imported into the exercise of their special jurisdiction under the sign-manual, all the powers which they wielded as chiefs of the court of chancery. Hence, after the custody is granted, the great seal acts in matters relative to the lunatic, not under the sign-manual, but by virtue of its general power as keeper of the king's conscience.[1]

553. In a few of the United States the care of the persons and estates of idiots and lunatics is entrusted to courts of chancery;[2] but even where this is the case the jurisdiction is ordinarily exercised under statutory provisions, by which the court is pointed out and the method of procedure prescribed. In most of the States of the Union, however, the care of persons *non compotes mentis* is confined to special tribunals, and is not made a part of equitable jurisdiction. In many cases, however, the mode of procedure has been borrowed from that which grew up under the English chancellors; and it may, therefore, be useful to give a very brief outline of that procedure.

554. The jurisdiction of the chancellor was exercised, in the first place, for the purpose of ascertaining the fact of lunacy; and, secondly, for the care of the lunatic and the management of his estate. The first purpose is attained by issuing a commission under the great seal in the nature of a writ *de lunatico inquirendo;* under which a jury is impannelled and sworn, the alleged lunatic and witnesses are examined, and a return thereof made into chancery. If the return untruly finds the party a lunatic, it may be traversed by himself or by any one claiming under a contract with him; if it untruly finds him of sound mind, a writ of *melius inquirendum* may be issued by the crown. If the lunatic subsequently recovers, the commission may be superseded; but for this purpose the lunatic must, in general, be personally examined and his sanity fully established.

[1] Ex parte Grimstone, Ambler, 707; Ex parte Fitzgerald, 2 Sch. & Lef. 438. Lord Campbell thought that the jurisdiction might be exercised by the chancellor by virtue of his general powers, and before any grant under the sign-manual, and so exercised it in Ireland. See 1 Campbell's Lives of the Chancellors, 14.

[2] Such is the case in Tennessee and Pennsylvania, *ante*, pp. 23 and 26, notes.

555. If the party is found a lunatic by the return of the commission, or upon a trial under the subsequent traverse, the next duty of the court is to take care of his person and estate, and this is done by the appointment of a committee. A committee may also be appointed pending the proceedings, when such a course shall be deemed necessary by the chancellor.

The powers of a committee are exceedingly limited. He is a mere custodian of the property; and even the powers conferred upon him by statute are to be exercised under the constant supervision and sanction of the court. A due allowance is made by the court for the lunatic's maintenance; and the general principle upon which the estate is managed is that the interest of the lunatic alone is to be looked to, without regard to that of his eventual successors.

The powers and duties of the committee of a lunatic, and the manner in which the estate is to be managed, or converted, or applied to the maintenance of the lunatic or his family, are regulated in most of the States by statutes, into the details of which it would be impossible to enter.

Upon the death of the lunatic the powers of the committee cease; and his duty is simply to account and hand over the property to the heir or personal representative of the lunatic, as the case may be.

CHAPTER VIII.

DISCOVERY.

556. Defects in common law as to discovery; statutory changes.
557. Origin and nature of bills of discovery.
558. Subject not of as much importance as formerly.
559. Discovery must be in aid of legal proceedings.
560. General rights of complainant in bills of discovery.
561. Rule for protection of defendant; need not discover his own title, or evidence thereof.
562. Need not criminate himself.
563. Confidential communications as to litigatior
564. State secrets.
565. In bills of discovery courts will go on and afford relief.
566. Production of documents.
567. Commissions to examine witnesses abroad; to take testimony *de bene esse*.

556. In a common-law action the plaintiff was obliged to make out his case by calling third parties as witnesses, by compelling the production of such documents material to the issue as were in the custody or under the control of third parties, and by producing, himself, such documents as were in his own possession, and whose execution could be properly proved. No means, however, existed by which the opposite party could be compelled to testify as to the matters in dispute, or by which the production of documents in his possession could be enforced. In modern times this rule has in England and in nearly all of the United States been altered by statute, and a party to a common-law action can now put his adversary upon the witness-stand without being concluded by his testimony, and without being subject to the rule which forbids leading questions; in other words, he can call and *cross-examine* the opposite party, and he can compel the production of books and papers at a reasonable period before the trial of the cause.

557. While the common-law rule prevailed, and while the inconvenience consequent thereon existed, a different rule grew up in courts of equity. It was part of the machinery of the

court of chancery that a *discovery* could be compelled; in other words, the defendant in a bill in equity was obliged to answer under oath the allegations in the bill.[1] The production of documents could also be enforced, and an opportunity for their inspection afforded. The right to discovery was in fact one of the peculiar advantages of a complainant in equity, and was always enjoyed by him in every case in which he was entitled to come into chancery, either for the purpose of asserting an equitable title, or setting up an equitable right, or applying an equitable remedy.

The jurisdiction of the High Court of Chancery being based upon matters of "conscience," an appeal to the defendant's conscience was one of the earliest and most natural modes of equitable relief.

But this right went still further. Many cases existed in which the plaintiff had a legal title or a legal right, or was pursuing a legal remedy, but wherein no redress could be actually obtained, simply because the plaintiff's evidence either rested in the breast of the defendant, or consisted, in whole or in part, of documents in the defendant's possession. Hence, there was a failure of justice at common law, and hence there arose the equitable remedy of bills for discovery, which was made use of simply for the purpose of assisting or supplementing the plaintiff's remedy at common law.

Bills in equity, therefore, came to be filed not only for the purpose of discovery *and* relief, but also for the purpose of *discovery alone;* and bills of the latter description were made use of as a distinct equitable remedy, entirely outside and independent of any equitable right or title to relief.

Bills of discovery, therefore, in their technical sense, are bills which are filed for the purpose of assisting one of the parties to a common-law action; and which, seeking no independent relief themselves, aim solely at arming the complainant with the necessary and proper means for asserting or defending his right or title at law.[2]

558. It has been already observed that the necessity for this equitable remedy has, in modern times, been very much dimin-

[1] See *ante*, p. 14.

[2] See Kearny *v.* Jeffries, 48 Miss. 357

ished by statutory enactments, whereby the same results are attained in common-law trials; and hence, this particular equitable remedy no longer deserves to occupy so important a place as it formerly did in equitable jurisprudence. Nevertheless, it is proper that it should be (at least) briefly considered, partly because it has been decided in England, and in some of the States of the Union, that the chancery method of redress has not been ousted by the amendments to the common law;[1] and partly because in equity certain rules in regard to this peculiar remedy have been laid down, which are still considered applicable in common-law suits.

559. The object of discovery being that the answer of the defendant may be made use of as evidence in some judicial proceeding in which no such advantage originally existed, it necessarily follows that this equitable remedy cannot be used except for purposes connected with proceedings in legal tribunals,[2] and except in aid of proceedings in a court which could not, at common law, itself give discovery.[3] Thus, a bill of discovery cannot be maintained if the object is simply to gratify the *curiosity* of the complainant, nor will such a bill be entertained in order to aid proceedings in a court which can, by its own method of procedure, attain the same result, *e. g.*, the ecclesiastical courts in England, which, as well as the court of chancery, had the power of enforcing discovery.[4] And a bill of discovery will not lie in aid of proceedings which are of a criminal and not of a civil nature.[5] But the circumstance that the proceedings *might* have assumed a criminal character is no objection to the discovery, if in fact the redress sought is through the medium of a civil action.[6]

[1] Lovell *v.* Galloway, 17 Beav. 1; Senior *v.* Pritchard, 16 Id. 473; British Empire Shipping Co. *v.* Somes, 3 K. & J. 433; Shotwell *v.* Smith, 5 C. E. Green, 70. See, however, Hall *v.* Joiner, 1 S. Carolina, (N. S.) 186.

[2] See Hare on Discovery, 110. It is not necessary that the proceedings in aid of which the discovery is sought should be against the defendant in the bill for discovery; they may be against a third party, and may be for the purpose of finding out who is the proper party to sue; see Orr *v.* Draper, L. R., 4 Ch. D. 92.

[3] Hare on Discovery, 119.

[4] Id.

[5] Lord Montagu *v.* Dudman, 2 Ves. Sr. 397; Cartwright *v.* Green, 8 Ves. 405; 14 Id. 64; Hare on Discovery, 110.

[6] Thorpe *v.* Macauley, 5 Madd. 230; Wilmot *v.* Maccabe, 4 Sim. 263; Hare on Discovery, 116.

560. The general right of the complainant in a bill of discovery is, that he is entitled to an answer from every competent defendant as to all facts material to the whole of his (the complainant's) case,[1] and that this answer must be distinct, complete, free from needless prolixity, and to the best of the defendant's information and belief. To dissect the general rule thus stated, and to criticise and illustrate its different branches, would belong rather to a treatise upon equitable pleading than to one which has for its subject equitable principles. It will therefore be sufficient to refer the reader to some of the works in which this rule has been particularly discussed.[2]

561. The general rule just stated is subject to certain qualifications by which the complainant's right is, as it were, fenced about by prohibitions and restrictions which it has been found necessary to lay down in order to prevent the power of the court from being abused.[3]

And, first, the defendant is bound to discover those matters only which relate to the plaintiff's title, and is not compellable to discover his own title or the means by which he expects to prove it.[4] The reason of this rule is that experience has shown that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury which must inevitably be incurred when either party is permitted *before* a trial, to know the precise evidence against which he has to contend; and accordingly each party in a cause has thrown upon him the *onus* of supporting his own case, and meeting that of his adversary without knowing beforehand by what evidence the case of his adversary is to be established or his own opposed.[5]

This reasoning, however, is not to be extended too far, for the

[1] See Methodist Church *v.* Jaques, 1 Johns. Ch. 65; Wistar *v.* McManes, 4 P. F. Sm. 318.

[2] See Story's Eq. Pleading, § 853 *et seq.*; Mitford's Pleading, 357, 365.

[3] See Wharton on Evidence, § 754 *et seq.*

[4] This rule is embodied in Sir James Wigram's third proposition, which is as follows: "The right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the *plaintiff's case*, and does not extend to a discovery of the manner in which the *defendant's case* is to be exclusively established or to the evidence which relates exclusively to his case." Wigram on Discovery, 15.

[5] Wigram on Discovery, 263. See Kettlewell *v.* Barstow, L. R., 7 Ch. 686.

right of the plaintiff to discovery in support of *his own case* is not to be abridged, as to any particular discovery, by the consideration that the matter of such particular discovery may be evidence of the defendant's case *in common* with that of the plaintiff.[1]

Thus, if a plaintiff is entitled to the production of a deed or other document as being applicable to *his* case, his right to such discovery will not be affected by the circumstance that the same document is evidence of the defendant's case also.[2] And so, if a defendant who is bound to keep distinct accounts for another party, *improperly* mixes them with his own, so that they cannot be severed, he must produce the whole.[3]

562. Secondly; a defendant need not answer matters which tend to criminate himself or expose him to a penalty or forfeiture; whether the matter inquired of be the broad and simple fact of crime or penalty, or whether it be simply an incidental fact which may form a link in the chain of evidence if any one chooses to indict him.[4]

But this rule has some exceptions, for it has not been invariably applied to all cases of penalties,[5] and it will not be available for the purpose of preventing the detection of fraud or imposition.[6]

563. Thirdly; confidential communications, made to advisers or agents, with reference to a subject-matter which afterwards comes into litigation, or with reference to questions connected with that which afterwards becomes the subject-matter of litigation, are protected.[7]

The tendency of the modern English authorities is to give a

[1] Wigram on Discovery, 260. See Brown *v.* Wales, L. R., 15 Eq. 142.

[2] Burrell *v.* Nicholson, 1 Myl. & Keene, 680; Wigram on Discovery, 242.

[3] Freeman *v.* Fairlie, 2 Meriv. 29; Earl of Salisbury *v.* Cecil, 1 Cox, 277; Hare on Discovery, 245; Wigram on Discovery, 243.

[4] Adams's Doct. Eq. 2. See Hill *v.* Campbell, L. R., 10 C. P. 222, and the language of Lord Chief Justice Coleridge on p. 247.

[5] King of Two Sicilies *v.* Wilcox, 1 Sim. N. S. 301; Skinner *v.* Judson, 8 Conn. 528; Mitford's Pleading, 195 *et seq.*

[6] Dummer *v.* Corporation of Chippenham, 14 Ves. 256; Lee *v.* Read, 5 Beav. 381; Skinner *v.* Judson, 8 Conn. 528; Attwood *v.* Coe, 4 Sandf. Ch. 413; Howell *v.* Ashmore, 1 Stockt. 82; Reynell *v.* Sprye, 10 Beav. 51; 11 Beav. 618.

[7] See Wharton on Evidence, § 576 *et seq.*

very wide scope to this rule, and to afford protection in cases in which, under the narrower doctrine which formerly existed, the communications would not have been considered privileged. Thus, in Lawrence *v.* Campbell[1] (decided in 1859), Vice-Chancellor Kindersly laid down the rule that it is not now necessary, as it formerly was, for the purpose of obtaining protection, that the communications should be made either during or relating to an actual or even to an expected litigation, but that it is sufficient if they pass as professional communications in a professional capacity. And this rule was expressly approved in 1873 by Lord Chancellor Selborne, in Minet *v.* Morgan,[2] where not only letters between the defendant and his family solicitors, and letters between himself and his solicitors in the cause, but also letters between the defendant's mother (through whom he claimed title) and her solicitors, with reference to questions connected with the matters in dispute, written before any litigation was in contemplation, were protected.[3]

So, also, a liberal interpretation was given to another branch of the rule, above stated, by Vice-Chancellor Stuart, in Ross *v.* Gibbs,[4] and it was there held by that learned judge that confidential communications, made with an *unprofessional* agent, were privileged, if such communications were made in anticipation of and with reference to a litigation.

The courts in this country, however, do not seem to have carried the doctrine of privileged communications to the extent which it has reached England. Thus, in Whiting *v.* Barney,[5] the Court of Appeals in New York adhered to the old rule that a communication, in order to be protected, must be made

[1] 1 Drew, 485, 490.

[2] L. R., 8 Ch. App. 361.

[3] "If this question had arisen," said the Lord Chancellor, in this case, "in the days of Lord Cottenham, it would have better justified the prolonged argument than at the present time. There can be no doubt that the law of the court as to this class of cases did not at once reach a broad and reasonable footing, but reached it by successive steps, founded on that respect for principle, which usually leads the court aright." And the chancellor then went on to discuss the cases *seriatim*, and to point out the process by which the present doctrine of the English courts had been attained. See, also, Wilson *v.* Northampton and Banbury Junction Railway Co., L. R., 14 Eq. 477; Bullock *v.* Corry, L. R., 3 Q. B. D. 356; The Southwark & Vauxhall Water Co. *v.* Quick, 3 Q. B. D. 315; and M'Corquodale *v.* Bell, L. R., 1 C. P. D. 471.

[4] L. R., 8 Eq. 522.

[5] 30 N. Y. 330.

during the pendency of a cause; while, in several cases, the applicability of the doctrine has been confined to disclosures made to *legal advisers* only, and has not been extended to persons of a non-professional character.[1] It is submitted, however, that the modern English rule is more consonant with principles of justice and public policy; and that the true tests to apply are these. first, was the communication made with reference to that which afterwards became the subject of litigation? and secondly, was the communication confidential? If both of these requisites exist, the sounder doctrine would seem to be that the disclosure should be protected.

It must be added that this privilege is the privilege of the client, not of the counsel. The client is entitled to the protection; and he alone can claim it.[2]

564. Lastly, official persons cannot be compelled to disclose matters of state, the publication of which would be prejudicial to the interests of the community. The rule exists both at law and in equity, and in this country as well as in England. The cases, however, in which the question has arisen are very few.[3]

Upon similar principles of public policy a court of justice will not allow interrogatories to be exhibited for the purpose of ascertaining the names of *informers*. The evidence is excluded not for the protection of the witness or of the party, but purely on the grounds of public policy.[4]

It will be remembered that a *bona fide* purchaser for value without notice is protected from discovery. The reasons for this rule, and its nature and extent, have been already stated.[5]

565. Before leaving the subject of discovery it may be desira-

[1] See Corps *v.* Washington, 2 Wash. C. C. 388; Andrews *v.* Solomon, Pet. C. C. 356; Goddard *v.* Gardiner, 28 Conn. 172; Coon *v.* Swan, 30 Verm. 6; Adams's Doct. Eq. 6, notes.

[2] See Ross *v.* Gibbs, L. R., 8 Eq. 524.

[3] See Smith *v.* East India Co., 1 Phillips, 50; Rajah of Coorg *v.* East India Co., 25 L. J. Ch. 365; Marbury *v.* Madison, 1 Cranch, 144; 1 Burr's Trial by Robinson, 186, 187. As to obtaining discovery from the sovereign of a foreign State, see King of Spain *v.* Hallet, 6 Clark & F. 333; United States *v.* Wagner, L. R., 2 Ch. 582; Republic of Peru *v.* Weguelin, L. R., 20 Eq. 140; Prioleau *v.* United States, L. R., 2 Eq. 659; Republic of Costa Rica *v.* Erlanger, L. R., 1 Ch. D. 171; Wharton on Evidence, § 604.

[4] See Rex *v.* Akers, 6 Esp. 125; Att. Gen. *v.* Briant, 15 Mees. & Wels. 169; United States *v.* Moses, 4 Wash. C. C. 726; Gray *v.* Pentland, 2 Serg. & Rawle, 23; Worthington *v.* Scribner, 109 Mass. 487. See, also, Totten *v.* The United States, 2 Otto, 105.

[5] *Ante*, § 275.

ble to notice a question as to which there has been not a little embarrassment in the minds of authors and judges; and that is, whether when the jurisdiction of equity has once attached for the purpose of discovery, the court will go on for the purpose of affording relief, although the cause is not one which would ordinarily fall within the scope of a chancellor's jurisdiction. The true rule would seem to be that laid down by a learned writer in modern times,[1] viz., that where the bill is filed purely in aid of a legal right and for the purpose of obtaining evidence to be used in a trial at law, the jurisdiction will not extend to afford relief; but that where the bill is based upon any breach of trust or duty, and an appeal to the defendant's conscience consequently becomes necessary, the general jurisdiction will attach.

566. At common law no power existed in the courts to compel the production of deeds, books and writings which were in the custody or control of one of the parties to a cause, and which were material to the right, title or defence of the other.[2] Application was, consequently, made to the court of chancery; and the jurisdiction of the chancellor was frequently exercised for the purpose of rectifying the defect in the common law, and of compelling such production.

This equitable remedy is, however, of scarcely any importance at the present day; as, both in England and in this country, statutes have been passed by which the authority to compel the production of documents is conferred upon the common-law courts. The consideration of this subject may, therefore, be dismissed with the single remark that the rules which govern bills in equity for the production of documents are similar to those by which the right to discovery is regulated, and which have been already noticed.

567. The remarks just made will also apply to bills for commissions to examine witnesses abroad, and to bills to take testimony *de bene esse*. Such bills were formerly necessary in consequence of the inability of the common-law courts to accomplish the object; but this defect has long since been remedied, and the equitable remedy has fallen almost completely into disuse.[3]

[1] Mr. Justice Redfield in his edition of Story's Equity Jurisp. 74 a, 74 c. See, also, Pearce *v.* Creswick, 2 Hare, 285.

[2] 2 Black. Com. 382; Story's Eq. Jurisp., § 1485.

[3] Story's Eq. Jurisp., § 1514, note; Adams's Doct. Eq. 23.

CHAPTER IX.

BILLS QUIA TIMET; RECEIVERS; WRITS OF NE EXEAT; AND OF SUPPLICAVIT.

568. Bills *Quia Timet;* their general nature.
569. Examples.
570. Personal property limited for life with remainders over.
571. Courts of equity will not entertain bills solely to *declare* rights.
572. Will not interfere in certain cases of covenants.
573. Bills to perpetuate testimony.
574. Bills to establish wills.
575. Bills to remove a cloud from title.
576. Receivers; general nature of the jurisdiction.
577. Appointment a matter of discretion; rules under which the discretion is exercised.
578. Cases in which a receiver will be appointed.
579. Effect of appointment.
580. Powers and duties of a receiver.
581. Writs of *Ne Exeat.*
582. Writs of *Supplicavit.*
583. Progressive capacity of Equity Jurisprudence.

568. Bills *Quia Timet* in equity answer to the *brevia anticipantia* of common law. These writs are enumerated and explained by Coke. "And note," he says, "that there be six writs in law that may be maintained, *quia timet*, before any molestation, distress or impleading. As (1) a man may have a writ of mesne (whereof Littleton here speaks) before he be destrained; (2) a *warrantia chartæ* before he be impleaded; (3) a *monstraverunt* before any distress or vexation; (4) an *audita querela* before any execution sued; (5) a *curia claudenda* before any default of inclosure; and (6) a *ne injuste vexes* before any distress or molestation."[1] By analogy to these writs, bills in equity are sometimes entertained to guard against possible or prospective injuries, and to preserve the means by which existing rights may be protected from future or contingent violations. The principle upon which the court acts in such cases is that justice sometimes requires that a man shall not be compelled to have hanging over him, or his title, for an indefinite time, some claim or demand or liability, which if enforced would subject

[1] Co. Litt. 100 a.

him to loss; but that he is entitled to have the questions relating to his rights settled at once and for ever, to have the claim against his rights enforced, or to be at once made secure against any future liability. It will be seen that relief of this sort goes one step further than the relief by injunction. Injunctions restrain a person from *continuing* an infringement upon the rights of another, and (in some cases) will *prevent* the commission of a threatened injury. But a bill *quia timet* proceeds to the extent of securing rights against an invasion, which need not be imminent or certain, but which may be only future and contingent. Looking, therefore, upon three of the equitable remedies, which are noticed in the present treatise, as arranged in an ascending scale, we have, upon the lowest step, *mandatory* injunctions, correcting *past* injuries and *restoring* rights; upon the next, prohibitory injunction, preventing *present* or *imminent* injuries and *preserving* rights; and upon the last, bills *quia timet*, anticipating and guarding against *future* and *contingent* injuries, and, as it were, *insuring* rights.

It is, perhaps, impossible to define the exact boundaries which circumscribe the area of the equitable remedy of bills *quia timet*, as they are not unfrequently entertained upon the peculiar circumstances of each individual case, and the instances in which the jurisdiction has been exercised are to be regarded rather as illustrations of the remedy, than as indicating the limitations of its extent.

569. A few examples, however, of bills of this kind will assist in making clear the general character and scope of this equitable remedy. Ranelaugh *v.* Hayes[1] is a case which is frequently cited as an illustration of bills of this class.[2] In this case, the plaintiff assigned several shares of the excise in Ireland to the defendant, and the latter covenanted "to save the Lord Ranelaugh harmless touching three parts of *a farm*,[3] assigned to Hayes," and to stand in his place touching the payments to the king and other matters. Afterward, the king sued the plaintiff for money which the defendant ought to have paid, and the former then filed his bill. The court decreed that the agreement should be specifically performed, and referred it to a master and directed that

[1] 1 Vern. 189.

[2] See Story's Eq. Jurisp., § 850; Rawle on Covenants for Title, 652.

[3] The Irish excise was *farmed out* by Charles II.

totics quotics any breach should happen he should report the same especially to the court, so that the court might, if there should be occasion, direct a trial at law in a *quantum damnificatus*. The court further decreed that the assignee should clear the assignor from all these suits and encumbrances within a reasonable time. The case was compared to that of a counter-bond, where, although the surety is not molested or troubled for the debt, yet after the money becomes payable, the court will decree the principal to pay it.[1] A more modern example of the same kind of relief will be found in the case of Hemming *v.* Maddick,[2] where the plaintiff, who had been made a contributory in respect of certain shares of a joint stock company, which was being wound up under the English Companies Act of 1862, filed a bill in which

[1] But the form of decree in Ranelaugh *v.* Hayes has been recently disapproved in Lloyd *v.* Dimmack, 7 Ch. D. 401, and in Hughes Hallett *v.* Indian Mammoth Gold Mines Co., 22 Id. 564. In the first case, Fry, J., said: "The next question is whether I can give judgment in the form asked for by the plaintiff's counsel declaring that the defendants are bound to indemnify according to the terms of the deed, and giving liberty to apply from time to time as breaches of the indemnity may occur. Now, in the first place, it will be observed that such a judgment would be highly inconvenient, because some of the leases are for long terms of years and I should be giving a judgment which would require from time to time the interference of the court over the whole residue of a term of ninety-nine years beginning in 1860. I think such a form of judgment would be highly inconvenient. In the next place I am not aware that, with the single exception of the case of Ranelaugh *v.* Hayes, any authority can be produced for a judgment of that description. That is a case which I believe has never been actually followed. It has been cited over and over again, but the industry and learning of the counsel of the plaintiff have not enabled them to produce a single case in which a decree has been made declaring the right to indemnity and giving liberty to apply from time to time. Therefore, upon the ground of the great inconvenience of such a judgment, and looking at the fact that no decree can be produced from the time of Ranelaugh *v.* Hays down to the present time, and looking at the not very clear report of that case and the difficulty of ascertaining the exact circumstances and especially what was the duration of the liability in respect of which that indemnity was declared, I feel myself bound to say that I cannot make such a declaration or give such a general liberty to apply." With due deference, however, to this opinion, it would seem that the advantages to be derived from a form of decree such as was entered in Ranelaugh *v.* Hayes are very great, and ought not to be discarded except under some very decided argument *ab inconvenienti* in a given case. It is submitted, therefore, that the general rule, as stated in the text, is sound.

[2] L. R., 7 Ch. 395.

he alleged that he had taken the shares under an arrangement with the defendant that he should hold them on behalf of the defendant, and deal with them as the defendant should direct, and that the defendant should indemnify him against all loss or liability which he might incur as the holder of the shares. The prayer of the bill was that the defendant might be ordered to reimburse to the plaintiff all sums of money which he had paid for calls and all costs *et cætera*, and to indemnify him against all liability in consequence of his being made a contributory. The trust having been satisfactorily established by the evidence, the plaintiff's right to the indemnity was treated as a matter of course, and a decree was made accordingly.[1]

570. Bills *quia timet* are also frequently entertained in cases where personal property is limited for life, with remainders over, and when there is danger of loss or deterioration or injury to it in the hands of the tenant for life. In such cases a court of equity will interfere at the instance of a remainder-man, and if necessary, will require security to be given for the production of the property upon the termination of the life interest.[2]

571. But while a court of equity will interfere for the purpose of protecting the interests of remainder-men, when the property is in danger, it will not interpose merely in order to declare future rights. The Scotch tribunals pass upon such questions by "*declarator*;" but such a power has not been assumed by courts of equity, either in England or in this country.[3] It is true that it is a very common exercise of chancery powers to declare the effect and validity of future and contingent limitations in wills, even as to persons not *in esse*, upon bills filed by executors and trustees, asking for the direction of the court as to the disposition of the property.[4] But bills of this

[1] See further as to decrees of indemnity as illustrated by the case of sureties, *ante*, § 331, and cases cited in notes.

[2] See Flight *v.* Cook, 2 Ves. 619; James *v.* Scott, 9 Alab. 579; Emmons *v.* Cairns, 2 Sandf. Ch. 369; McDougal *v.* Armstrong, 6 Humph. 157, 428; Bowling *v.* Bowling, 6 B. Mon. 31; Cranston *v.* Plumb, 54 Barb. 54; Van Duyne *v.* Vreeland, 1 Beas. 142; McNeill *v.* Bradley, 6 Jones, (Eq.) 41.

[3] See Grove *v.* Bastard, 2 Phillips, 621; Langdale *v.* Briggs, 39 Eng. Law and Eq. 214; 8 De G., M. & G. 391; Cross *v.* DeValle, 1 Wallace, 14 and Girard *v.* Philadelphia, 7 Id. 1, and the remarks of the court on page 15.

[4] "A bill in equity cannot be maintained simply to establish the fact of a

kind are entertained upon the ground that a trustee is always entitled to come into chancery for advice and assistance in the administration of the trust;[1] and do not, therefore, in any way, militate against the doctrine, just stated, as to mere declarations of future rights.[2]

572. Another illustration of the limitations which courts of equity have deemed proper to place upon relief of a *quia timet* character, is found in those cases in which a purchaser of land takes it subject to an encumbrance of which he is aware, and takes also a covenant from the vendor against the encumbrance. In such cases it has been held that the purchaser cannot, under such circumstances, file a bill *quia timet*, and obtain an indemnity from the vendor; the ground of these decisions being, that, as the purchaser has chosen to rest upon the covenant, a court of equity will not make a new contract for the parties.[3]

573. Bills to Perpetuate Testimony, and Bills to Establish Wills, are also in the nature of bills *quia timet*. The perpetuation of testimony is necessary when the complainant is not actually threatened with any disturbance of his rights, but fears that he may be disturbed at some future time when the evidence of his title may have been lost. Upon a bill being filed, in such a case, the depositions of witnesses are taken before an examiner, and a decree is then made that the depositions so taken shall remain to perpetuate the memory thereof. Bills of this description have been of very frequent occurrence in Pennsylvania, for the purpose of preserving the evidence of a re-entry upon land, conveyed upon ground-rent, for non-payment of arrears of rent.

In order to maintain a bill for the perpetuation of testimony, it is necessary that the matter should be one which cannot be

trust, no other relief being sought, even where its existence is denied; if, however, the supposed trustee is about to leave the jurisdiction, so that no relief could be obtained, the court will entertain the bill and declare the trust, if proved, and retain the bill for further action." Perry on Trusts, § 17, citing Baylies *v.* Payson, 5 Allen, 473; Price *v.* Minot, 107 Mass. 62.

[1] *Ante*, p. 191; Hill on Trustees, 543.

[2] See the remarks of Mr. Justice Grier, in Cross *v.* De Valle, 1 Wallace, 15 and 16, As to special cases which may be submitted to the courts in England under 13 and 14 Vict., c. 35, see Forsbrook *v.* Forsbrook, L. R., 2 Eq. 799; 3 Ch. 93.

[3] See Redfield *v.* Woodfolk, 22 How. 318; Rawle on Covenants for Title, 683, 684 (4th ed.); Story's Eq. Jurisp., § 850, a (11th ed.).

made the subject of present judicial investigation. If a party is in a situation actively to assert his right, either at law or in equity, he cannot maintain a bill to perpetuate the testimony, for he can obtain the same redress by proceeding at once to a substantial assertion of his title by suit at law or bill in equity. And even if a party is *not* in a condition to make himself a plaintiff, yet if an action is brought against him, touching the subject-matter, he cannot file a bill for the perpetuation of testimony, and a demurrer to such a bill will be sustained on the ground that the complainant's rights can be ascertained and settled in the suit already pending.[1]

574. Bills to Establish Wills proceed upon a similar principle. According to the modern authorities such a bill may be filed by a devisee in possession against an heir who has brought no action of ejectment, although no trusts are declared by the will, and although it is not necessary to administer the estate under the direction of the court of chancery.[2] And the same relief will also be afforded not only against an heir, but also against parties claiming under another will.[3]

575. Bills to remove a cloud from a title may sometimes also fall under the head of relief *quia timet*, although, as has been seen, they may occasionally be properly classed under bills for the surrender and cancellation of void instruments.[4] The doctrine, however, is not confined in its application simply to cases in which a void or voidable instrument is sought to be cancelled. It may be asserted in almost any case in which justice requires that the title of a party in possession should be quieted, and the

[1] See Earl Spencer *v.* Peek, L. R., 3 Eq. 415, where this point is thoroughly discussed. See, also, upon the general subject of bills to perpetuate testimony, Dursley *v.* Fitzhardinge, 6 Ves. 251; Dorset (Duke of) *v.* Girdler, Prec. Ch. 531; Angell *v.* Angell, 1 Sim. & Stu. 83; Beavan *v.* Carpenter, 11 Sim. 22; Wright *v.* Tatham, 2 Sim. 459; Story's Eq. Plead., § 300 *et seq.*

[2] Boyse *v.* Rossborough, Kay, 71; affirmed in 3 De G., M. & G. 817; and on appeal to the House of Lords, *nom.* Colclough *v.* Boyse, 6 H. L. Cas. 1. See, also, Fidelity Ins. Co.'s Appeal, 99 Pa. St. 460, and Hall's App., 110 Id. 54.

[3] Lovett *v.* Lovett, 3 K. & J. 1. In re Tayleur, L. R., 6 Ch. 416, was a somewhat curious application. The committee of a wealthy lunatic, who had made two wills before he was found a lunatic, asked for leave to pay out of the estate the costs of the plaintiffs and defendants in a suit to perpetuate testimony as to the two wills. The court declined to express any opinion upon the question whether or not such a bill would lie, but granted the prayer of the committee.

[4] See *ante*, § 474; Dull's Appeal, 113 Pa. St. 515.

evidence of that title is clear.[1] The principle upon which these bills are based is, simply, that it is inequitable that a party in possession should be embarrassed by having hanging over him a hostile claim, which, although not actively asserted, and not of any validity, is nevertheless calculated to affect the marketability of the title. The jurisdiction of courts of chancery in such cases is well established.[2] Whether it is essential to the assertion of this equity, that the complainant should be in possession, is a question as to which there has been some variance in the decisions. In some cases it is held that possession is indispensable, and that this fact should be averred in the bill.[3] In others, the contrary has been ruled;[4] and this seems to be the better doctrine, especially where the bill is filed by a remainderman during the continuance of the particular estate.[5]

This jurisdiction, however, will not be exercised unless some equity is apparent, or a cloud would otherwise exist against the title of the complainant. If no such equity is shown, or no such injury is likely to ensue, the relief will be refused.[6]

[1] Alexander *v.* Pendleton, 8 Cranch, 462; Alsop *v.* Eckles, 81 Ill. 424; Parker *v.* Stevens, 59 N. H. 203. The evidence must be clear, for equity will not lend its aid to try conflicting titles. See Handy *v.* Noonan, 51 Miss. 166; Phelps *v.* Harris, Id. 789.

[2] Doe *v.* Doe, 37 N. H. 268; Kimberley *v.* Fox, 27 Conn. 307; Eldridge *v.* Smith, 34 Vt. 484; Tucker *v.* Kenneston, 47 N. H. 267; Polk *v.* Rose, 25 Md. 153; Brown *v.* Stewart, 56 Md. 431; Allen *v.* Waldo, 47 Mich. 516; Marston *v.* Rowe, 39 Alab. 722; Shattuck *v.* Carson, 2 Cal. 588; Whillock *v.* Gresham, 3 Sneed, 237; Almony *v.* Hicks, 3 Head, 39; Holland *v.* Mayor of Baltimore, 11 Md. 186; Belknap *v.* Belknap, 2 Johns. Ch. 472; Starr *v.* Starr, 1 Ohio, (Ham.), 321; Schofield *v.* Lansing, 17 Mich. 437 (a bill to restrain the collection of a tax); Finch *v.* Resbridger, 2 Vern. 390; Story's Eq. Jur., § 700. See, also, Kay *v.* Scates, 1 Wright, (Pa.) 31; Bacon's App., 7 P. F. Sm. 504; Groves *v.* Webber, 72 Ill. 606; Reynolds *v.* Crawfordsville Bk., 112 U. S. 405; Ludington *v.* Elizabeth, 34 N. J. Eq. 357; Sanders *v.* Village of Yonkers, 63 N. Y. 489; N. Y., Ont. & Western Ry. *v.* Davenport, 65 How. (N. Y.) Pr. 484; Goodell *v.* Blumer, 41 Wis. 436; Wiard *v.* Brown, 59 Cal. 194; Article in 20 Am. Law Reg., N. S. 561, by Henry Wade Rogers; *ante*, §§ 193 and 475.

[3] Gage *v.* Griffin, 103 Ill. 41; Gage *v.* Schmidt, 104 Id. 106. See, also, Haythorn *v.* Margerem, 3 Hals. 324; Kilgannon *v.* Jenkinson, 51 Mich. 240.

[4] Thompson *v.* Lynch, 29 Cal. 189; Almony *v.* Hicks, 3 Head, 39; Lees *v.* Wetmore, 58 Ia. 170.

[5] Aiken *v.* Suttle, 4 Lea (Tenn.) 103.

[6] See Eckman *v.* Eckman, 5 P. F. Sm. 269; Haines's App., 23 Id. 169. See, also, Orton *v.* Smith, 18 How. 263; Munson *v.* Munson, 28 Conn. 582;

576. Another of those equitable remedies which have for their object the *prevention*, rather than the *redress*, of injuries is found in the relief given by courts of chancery by means of the appointment of receivers. The appointment of receivers has, indeed, in many treatises, been classed under the head of the *quia timet* jurisdiction of chancery, and in a certain sense this classification is correct; but, perhaps, it would be still more accurate to say that the relief afforded by the appointment of receivers is one of several phases which the *preventive* jurisdiction of the court of chancery assumes, and that it is analogous to, rather than identical with, the relief which is granted in bills which are technically *quia timet*.

The general subject of receivers is one which has assumed not a little importance during the past few years; and the necessity for such a preventive remedy has not only led to the frequent interposition of courts of chancery, but has also induced legislation in very many States of the Union, by which the same object is attained through the medium of statutory forms. Even, however, in those States where such statutes exist, the principles of the court of chancery in relation to receivers are looked to for guidance; and hence it will be proper to give an outline (which must necessarily be a brief one) of these principles, and a few illustrations of the manner in which they are applied.

A receiver is an indifferent person between the parties appointed by the court to collect and receive the rents, issues and profits of land, or the produce of personal estate, or other things which it does not seem reasonable to the court that either party should do; or where a party is incompetent to do so, as in the case of an infant.[1] The remedy of the appointment of a receiver is one of the very oldest in the court of chancery;[2] it has been assumed for the advancement of justice, and is founded on the inadequacy of the remedy to be obtained in the courts of ordinary jurisdiction.[3]

Gamble *v.* Loop, 14 Wis. 465; Moore *v.* Cord, Id. 213; Farnham *v.* Campbell, 34 N. Y. 480; Wells *v.* Buffalo, 80 N. Y. 253; Lehman *v.* Roberts, 86 N. Y. 232. But see Dederer *v.* Voorhis, 81 N. Y. 153.

[1] Dan. Ch. Prac. 1552; Kerr on Receivers, 2 (2d Am. ed.). See, also, Booth *v.* Clark, 17 Howard, 331; Lottimer *v.* Lord, 4 E. D. Smith, 183; Libby *v.* Rosekrans, 55 Barb. 202; Baker *v.* Backus, 32 Ill. 79; Beverley *v.* Brooke, 4 Grat. 208.

[2] Per Vice-Chancellor Sir G. M. Giffard, in Hopkins *v.* Canal Proprietors, L. R., 9 Eq. 447. See, also, 1 Spence Eq. 773, note f; and Id. 378.

[3] Kerr on Receivers, 1.

577. As a general rule the appointment of a receiver is a matter which rests in the discretion of the court;[1] but this discretion is sometimes the subject of error;[2] and is always exercised under certain well-established rules. These rules were stated in Blondheim *v.* Moore (a leading authority in this country), to be (1) that the power of appointment is a delicate one, and is to be exercised with great circumspection; (2) that it must appear that the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property; (3) that the court never appoints a receiver merely because the measure can do no harm; (4) that fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved; and (5) that unless the necessity be of the most stringent character, the court will not appoint a receiver until the defendant is first heard in response to the application.[3]

The conduct of the party who applies for a receiver is also the subject of scrutiny, and unless that conduct is free from blame a receiver will be refused.[4] Moreover, parties who have acquiesced in property being enjoyed against their own alleged rights, cannot come into the court for a receiver.[5]

578. The cases in which a receiver may be appointed are numerous. Thus, the appointment may be made either because of the incapacity of the holder of the legal title; or because of the untrustworthiness of such holder; or because of disputes between legal owners; or because equitable rights might be endangered by leaving the property in the hands of the holder of the legal title; or because the rights of remainder-men or reversioners might be endangered.

Of the first head the case of infants is an example. The court

[1] Owen *v.* Homan, 4 H. L. Cas. 1032; Kerr on Receivers, 3 (2d Am. ed.), and notes.

[2] See Milwaukee Railroad Co. *v.* Soutter, 2 Wallace, 521, where an order of the Circuit Court refusing to discharge a receiver was, under the circumstances, held to be error, and was reversed in the Supreme Court.

[3] Blondheim *v.* Moore, 11 Md. 364. See, also, Voshell *v.* Hynson, 26 Md. 83; Tomlinson *v.* Ward, 2 Conn. 391; Orphan Asylum *v.* McCartee, Hopkins, 429; Mays *v.* Rose, 1 Freem. (Ch.) 703; Ladd *v.* Harvey, 1 Foster, 514; Maynard *v.* Railey, 2 Nevada, 313; Crawford *v.* Ross, 39 Ga. 44; Whitworth *v.* Whyddon, 2 Mac. & G. 55; Evans *v* Coventry, 5 De G., M. & G. 917; Cupit *v.* Jackson, 13 Price, 734; Kerr on Receivers, 10 (2d Am. ed.).

[4] See Baxter *v.* West, 28 L. J. Ch. 169.

[5] See Tibbals *v.* Sargent, 1 McCart. 449.

will interfere for the protection of infants; and will protect their estate even as against the legal guardian.[1]

Of the second head, illustrations will be found in those cases in which property is taken out of the hands of executors or trustees, and placed in the custody of receivers. In such cases the court will not act upon slight grounds, but upon a proper case being made out, as where misconduct, waste or improper disposition of trust assets can be shown, there is a case for a receiver.[2]

Again; receivers may be appointed because of disputes between holders of legal titles, whether the dispute is as to who is really the holder of the legal title, or as to which of two legal holders shall be entitled to the custody of the property. Thus where there is a dispute as to the right of probate or of administration, a receiver will, in a proper case, be appointed.[3] It must, however, be remembered that such appointments are only made in obedience to the general rules already stated; and that the court will not interfere unless there is proof that the legal title is in danger of being abused.[4]

An illustration of the necessity for the appointment of a receiver as between two holders of the legal title, occurs in the case of partners. Where there is a violation of partnership rights by which an improper or fraudulent disposition of partnership property may be effected, a receiver will be appointed; but the jurisdiction in such cases is an extremely delicate one, and should not be exercised except in such cases of misconduct as would justify a decree for a dissolution; and even where a dissolution is contemplated by the decree and there is a disagreement among the partners, it is not in all cases proper to appoint a receiver.[5]

[1] Butler *v.* Freeman, Amb. 303; Beaufort (Duke of) *v.* Berty, 1 P.Wms. 704; Rice *v.* Tonnele, 4 Sandf. (Ch.) 568; Kerr on Receivers, 16 (2d Am. ed.).

[2] Beverly *v.* Brooke, 4 Grattan, 208; Liddell's Ex'rs. *v.* Starr, 4 C. E. Greene, 163; Anon., 12 Ves. 4; Evans *v.* Coventry, 5 De G., M. & G. 918; Kerr on Receivers, 18 *et seq.* (2d Am. ed.).

[3] King *v.* King, 6 Ves. 172; Devey *v.* Thornton, 9 Hare, 229; Hitchin *v.* Birks, L. R., 10 Eq., 471; Rutherford *v.* Douglass, 1 Sm. & Stu. 111, n.; Ball *v.* Oliver, 2 V. & B. 96; Rachel Colvin's Case, 3 Md. Ch. Dec. 279.

[4] Dewey *v.* Thornton, 9 Hare, 229; Hitchen *v.* Birks, L. R., 10 Eq. 471; Schlecht's Appeal, 10 P. F. Sm. 172.

[5] Slemmer's Appeal, 8 P. F. Sm. 168. See, upon the subject of the appointment of receivers in partnership cases, Gowan *v.* Jeffries, 2 Ashmead, 304;

Receivers will be appointed when equitable rights are in danger of being injured by a holder of the legal title. Thus a receiver may be appointed on the application of an equitable mortgagee, in a foreclosure suit or other suit for enforcing his security against the mortgagor in possession having the legal estate.[1] And so, also, in carrying out equitable remedies, it is sometimes necessary to appoint a receiver; as (for example) in the case of creditors' bills, or other means by which the rights of judgment creditors, against property which cannot be reached at law, are sought to be enforced.[2]

The holder of an estate in remainder may also apply for a receiver in consequence of the misconduct of the holder of the particular estate.[3]

Other cases in which receivers are appointed and which fall within the general principles already stated, are those between debtor and creditor,[4] in the case of public companies;[5] between vendor and purchaser;[6] between covenantor and covenantee;[7] in cases of bankruptcy;[8] in cases of lunacy;[9] of tenants in common;[10] and in the case of parties in possession of real estate under a legal title.[11]

But a court of equity will not appoint a receiver simply on the ground of public convenience, or because there happens to be no other means of collecting or taking care of a fund. Thus, when the proper officers of a county have levied a tax, but no one will act as collector, this gives the court no jurisdiction to fill that office or appoint a receiver.[12]

579. A receiver is an officer of the court, and his possession is that of the court. The effect of his appointment is to remove the parties to the suit from the possession of the property; but at the same time, the *right* to the property is in no way affected

Holden *v.* McMakin, 1 Pars. Eq. Cas. 270; Williamson *v.* Wilson, 1 Bland, 418; Randall *v.* Morrell, 2 C. E. Green, 346; Sloan *v.* Moore, 1 Wright, (Pa.) 217; Morey *v.* Grant, 48 Mich. 326; Barnes *v.* Jones, 91 Ind. 161; Kerr on Receivers, 90 (2d Am. ed.).

[1] Reid *v.* Middleton, T. & R. 255; Kerr on Receivers, 53 (2d Am. ed.).

[2] See Osborn *v.* Heyer, 2 Paige, C. R. 342; Kerr on Receivers, 55–65 (2d Am. ed.).

[3] Kerr on Receivers, 89 (2d Am. ed.).

[4] Id. 55–65.

[5] Id. 66–80.

[6] Id. 81–87.

[7] Id. 87–89.

[8] Id. 110, 113.

[9] Id. 113.

[10] Id. 114, 120.

[11] Id. 120–127.

[12] Thompson *v.* Allen Co., 115 U. S. 550.

by such appointment, and the receiver merely holds the property as a custodian, and for the benefit of him who may be ultimately entitled to it. The possession of the receiver will be protected from interference by third persons; and the court will not permit this possession to be disturbed even by judicial process.[1]

580. A receiver is as a general rule a mere custodian, and has no powers except those expressly conferred upon him by the order of his appointment, or by special directions of the court from time to time. His general duty may be said to be to take possession of the estate in the room and place of the owner thereof; and, under the supervision of the court, to manage the property so as to preserve the same, and (if possible) to make it profitable for those who may ultimately be declared the owners thereof. The powers of a receiver are limited. All his actions are under the immediate control of the court; and in order to a safe custody of the estate he must constantly apply to the court for its advice and sanction.[2]

581. The writ of *Ne Exeat Regno* is an equitable remedy in the nature of bail at common law. It was at first a high prerogative writ, and is supposed to have been introduced originally some time between the reign of John and that of Edward I.; and it was issued only when the government deemed it expedient, as a matter of State policy to restrain some one from departing from the kingdom.[3] As early as the reign of Queen Elizabeth, however, the practice grew up of using the writ as a purely civil remedy, and for the purpose of enforcing equitable rights. This is the only use which is made of it in this country, where it is treated, not as a prerogative writ, but as an ordinary process which issues as of right, in cases in which it is properly grantable.[4] This remedy has accordingly been made use of in many States from the early colonial periods down to the present

[1] Kerr on Receivers, chap. vi. (2d Amer. ed.).

[2] Id. chap. vii.

[3] The object was to prevent a subject from going to the King's enemies. Bernal *v.* The Marquis of Donegal, 11 Ves., Jr. 46. See further as to the origin of the writ, Beames on Ne Exeat, 9–11; 1 Hovenden's Notes, 457, note to De Carriere *v.* De Calonne, 4 Ves. 577.

[4] Story's Eq. Jurisp., § 1469. See Jackson *v.* Petrie, 10 Ves. 164.

time;[1] and in some States the jurisdiction to issue such writs is expressly conferred by statute.[2]

The remedy is of a very useful character, and sometimes of great practical importance. Thus, to take a modern case by way of illustration, in MacDonough *v.* Gaynor,[3] the complainants and defendants were engaged in partnership in New Jersey in the construction of a railroad, and a bill was filed for an account. The defendants resided in Pennsylvania;[4] and it was shown by affidavit that they were only temporarily in New Jersey, and intending returning to the former State in a very short time.[4] Upon this state of facts, the writ of *ne exeat* was issued, the defendants to be released upon giving bond to answer and abide the decree of the court.

From the authorities upon the subject of writs of *ne exeat*, both in England and in this country, it has been considered that as a general rule the writ will be issued only in the case of equitable debts and claims,[5] but that to this rule there are two exceptions, viz., first, in the case of alimony decreed to a wife, which will be enforced against her husband by a writ of *ne exeat* if he is about to quit the State;[6] and, secondly, in certain cases of account,[7] which are, however, after all, of equitable cognisance, and, therefore, do not properly constitute an exception to the general rule.[8]

[1] See Rawle's Essay on Equity in Pennsylvania, 40 *et seq.;* and the Registrar's Book of Keith's Court of Chancery, in the Appendix. See, also, Rice *v.* Hale, 5 Cush. 242; Samuel *v.* Wiley, 50 N. Hamp. 353; Porter *v.* Spencer, 2 Johns. Ch. 169; Mattocks *v.* Tremain, 3 Johns. Ch. 75; Woodward *v.* Schalzell, 3 Johns. Ch. 412; Gilbert *v.* Colt, 1 Hopk. 479; Bushnell *v.* Bushnell, 15 Barb. 399; Breck *v.* Smith, 54 Id. 212; Dransfield *v.* Dransfield, 6 Philada. 143; Loewenstein *v.* Beirnbaum, 8 W. N. C. 163; McDonough *v.* Gaynor, 3 C. E. Green, 249; Dean *v.* Smith, 23 Wisc. 483; Dan. Ch. Prac. (by Perkins) 1800.

[2] See *ante* Introduction, p. 22 *et seq.*

[3] 3 C. E. Green, 249.

[4] It is sufficient if the affidavit allege that the defendant is going abroad and that the debt will be in danger, without averring that the *purpose* of going abroad is to avoid the demand. Tomlinson *v.* Harrison, 8 Ves., Jr. 32.

[5] Seymour *v.* Hazard, 1 Johns. Ch. 1; Smedburg *v.* Mark, 6 Id. 138.

[6] Denton *v.* Denton, 1 Johns. Ch. 364, 441.

[7] See 1 Hov. Notes to Vesey, Jr. 458; note to De Carriere *v.* De Calonne, 4 Ves., Jr. 577.

[8] The application of the writ must be supported by affidavit, which must be as positive as to the equitable debt, as an affidavit of a legal debt to hold to bail; Jackson *v.* Petrie, 10 Ves. Jr. 164; Thorne *v.* Halsey, 7 Johns. Ch. R. 189;

582. The writ of *Supplicavit* was a writ in the nature of process at common law to find sureties of the peace. "It was granted," says Lord Chief Baron Gilbert, "upon complaint and oath made of the party, where any suitor of the court is abused and stands in danger of his life, or is threatened with death by another suitor."[1]

This writ has gone almost completely out of use, as the same end is now fully attained by proceedings at common law, by which security for breach of the peace is exacted. No case in which this writ has been granted appears to exist in the United States. Chancellor Kent, in Codd *v.* Codd,[2] refused the writ, and doubted whether it ought now to be granted in chancery as the remedy in law is complete; and although it is said by Mr. Justice Story, in his Commentaries on Equity Jurisprudence, that "it is difficult upon the authorities to maintain the doubt,"[3] yet the opinion of Chancellor Kent seems to have been adopted in a modern case by the Supreme Court of Massachusetts. The case referred to is Adams *v.* Adams,[4] decided in 1868, where a married woman applied for the writ of *supplicavit* in order to obtain maintenance from her husband, by whom (it was alleged) she was cruelly treated. The application was refused, partly on the ground that a decree for alimony was only incidental to the relief afforded by a writ of *supplicavit*, and could not therefore be made the main object of the writ, and partly, also, because the complainant had a complete remedy at law.[5]

583. The fact that the writ of *Supplicavit* has fallen into disuse is an illustration of the truth of the progressive capacity of equity jurisprudence. The principles of equity had their origin, as we have seen, in the inability of the common-law courts to

an averment on information and belief is insufficient, except in the single case of matters of pure account,—as in the case of partners and executors; Id. Rico *v.* Gaultier, 3 Atk. 501. The writ must be asked for with the utmost promptness, otherwise it will be refused. Jackson *v.* Petrie (*supra.*)

[1] Gilbert's Forum. Rom. 202, 203. See Colman *v.* Sarrel, 1 Ves., Jr. 50, for an instance in which the writ was granted.

[2] 2 Johns. Ch. 141.

[3] Story's Eq. Jurisp., § 1476, note.

[4] 100 Mass. 265.

[5] One of the grounds of the application in this case was that the complainant had conscientious scruples against instituting proceedings in divorce; but the court said, with no little force, that it could hardly be contended that a bill in equity on an ordinary tort (for example) could be supported simply because the complainant was conscientiously opposed to bringing a common-law action.

afford redress in all cases of wrong. In not a few instances this inability has passed away; and while, in such cases, the jurisdiction of courts of chancery has sometimes been maintained, it has sometimes ceased with the occasion for its exercise. The dead limbs (so to speak) have fallen to the ground; and the vitality of the system has been shown by its ability to discard doctrines which have, in the progress of society or of reform in the common law, become useless. On the other hand, growth in various directions has constantly been, and still is, taking place. In concluding our examination of the principles of equity it is important to bear this fact in mind. It is important to recollect that the creative capacity of equity jurisprudence has not only given birth, in the past, to the principles which compose it, but that this creative faculty still continues to be energetic and productive, and is, in modern times, constantly modifying old doctrines and inventing new ones.[1] The progressive capacity of this great branch of the law should always be borne in mind by every student and by every practitioner.

[1] The language of a distinguished equity judge upon this point may be appropriately quoted: "It must not be forgotten," said the late Sir George Jessel, M. R., "that the rules of courts of equity are not, like the rules of common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved and refined from time to time. In many cases, we know the names of the chancellors who invented them. No doubt they were invented for securing the better administration of justice, but still they were invented. * * * The doctrines (of equity) are progressive, refined and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern, than to the more ancient cases." In re Hallett's Estate; Knatchbull *v.* Hallett, 13 Ch. D. 710.

INDEX.

(The References are to the Sections.)

ABROAD, COMMISSIONS TO EXAMINE WITNESSES, 567.

ACCIDENT, 23, 174–183.
definition of, 174.
limitations upon the relief afforded in equity in cases of, 175.
when relief will be afforded in cases of, 176.
lost instruments, 177.
penalties, 178.
liquidated damages, 179.
agreements for reduction of debt, 180.
Thompson *v.* Hudson, 180.
forfeitures, 181.
defective execution of powers, 182.
miscellaneous cases of, 183.

ACCOUNT, 32, 479–486.
liability of trustees to, 148, 239.
general nature of the right to an, 479.
bill for an, 480.
inadequacy of common-law remedies in cases of, 481.
origin of remedy in equity by a bill for an, 482.
limitations upon this remedy, 483.
extent of this remedy, 484.
plea of stated account, 485.
leave to surcharge and falsify, 486.
in cases of dower, 498.

ACCOUNTS OF TRUSTEES, 148.

ACCUMULATIONS, 133.

ACQUIESCENCE IN FRAUD, 259.

ACTIONS ON THE CASE, ORIGIN OF, 7.

ACTIVE TRUSTS, 20, 54.

ACTUAL FRAUD. [See FRAUD], 206.

ACTUAL NOTICE, 268.

ADJUSTMENT, 27, 326-350. See SET-OFF; CONTRIBUTION; EXONERATION; SUBROGATION; MARSHALLING.

ADMINISTRATION SUITS, 23, 528.
nature of, 528.
not of great importance in this country, 629.
general course of proceeding in, 530.
doctrine of equitable assets in, 531–534.
of performance in, 535–537.
of satisfaction in, 538–540.

ADVANCEMENTS, 84.
ordinary presumption of resulting trust rebutted by, 84.
Dyer *v.* Dyer, 84.
what will be considered, 84.

ADVANCES, MORTGAGE TO SECURE, 159.

ÆQUITAS, CAN BE DEFINED ONLY HISTORICALLY, 1, *note*.

AFTER-ACQUIRED LANDS, ELECTION IN CASES OF, 292.

AGENTS, BILLS FOR ACCOUNT BY AND AGAINST, 484.
fraudulent representations by, 217.
stand in a fiduciary relation to their principals, 237.
cannot make profit at expense of their principals, 93.

ALABAMA, COURTS OF CHANCERY IN, 15, *note*.

ALIENATION OF EQUITABLE ESTATES, 61.
restraint upon, 61.
Nichols *v.* Eaton, 61.

ALIENATION OF NEGOTIABLE SECURITIES, INJUCTIONS IN CASES OF, 459.

ALIENATION PENDING LITIGATION, 460.
injunctions in cases of, 460.

ALIENATION BY MARRIED WOMEN, RESTRAINT UPON, 104.

ALIENS, TRUSTS FOR BENEFIT OF, 60.
doctrine of conversion applied for benefit of, 314.

ALIMONY, WHEN DECREED IN EQUITY, 113.
Garland *v.* Garland, 113.

ANNUITIES, ASSIGNABLE AT COMMON LAW, 163.

ANSWER IN CHANCERY, EFFECT OF, 9.

ANTICIPATION, RESTRAINTS ON, 104.

APPLICATION OF PURCASE-MONEY, 277.
doctrine abolished in England, 278.
of little importance in the United States, 279

ARKANSAS, EQUITABLE JURISDICTION OF THE COURTS IN, 15, *note.*

ASSETS, EQUITABLE. See EQUITABLE ASSETS.

ASSIGNEE OF CHOSE IN ACTION TAKES SUBJECT TO EQUITIES 171.

ASSIGNMENTS, 22, 162-173.
of chose in action, common-law rule as to, 162.
exceptions to common-law rule as to 163.
allowed in equity, 164.
of future property, 165.
Holroyd *v.* Marshall, 165.
Ex parte Barton, 165.
McCaffery *v.* Wooden, 165.
exceptions to equitable rule as to, 166.
of part of fund, 166.
Manderville *v.* Welch, 166.
requisites to, 167.
what will amount to, 167.
order on a fund, 167.
promise to pay out of, 167.
Bradley's case, 167.
Rodick *v.* Gandell, 167.
Ex parte Tremont Nail Company, 167.
draft not an assignment, 167.
notice of, when necessary, 168.
to whom given, 168.
authorities in United States as to notice of conflicting, 169.
effect of equitable, 170.
subject to equities between original parties, 170.
whether subject to equities of third parties, 171.
rights of action of assignee at law, 172.
in equity, 172.
of liability to be sued, 173.
specific performance of, contract for, 369, 377.

ASSIGNMENTS FOR BENEFIT OF CREDITORS, 68.

ASSURANCE, SPECIFIC PERFORMANCE OF COVENANTS FOR FURTHER, 367.

ATTORNEY CANNOT MAKE A PROFIT AT EXPENSE OF PRINCIPAL, 93.

ATTORNEY AND CLIENT. See SOLICITORS AND CLIENT, AND DISCOVERY.

AUCTION, PUFFING AT, 209.
fraud on owner of property sold at, 210.

AWARDS, EQUITY WILL CORRECT MISTAKES IN, 196.

BANKRUPT ACT, EFFECT OF ON PARTNERSHIP AND SEPARATE DEBTS, 519.

BANKRUPTCY, MARSHALLING APPLIED IN CASES OF, 343.
injunctions in aid of proceedings in, 423.

BILL IN EQUITY, DESCRIPTION OF, 9.

BILLS OF EXCHANGE, LIENS BY, 351.

BILLS OF INTERPLEADER. [See INTERPLEADER], 419-422.

BILLS OF LADING, ASSIGNMENT BY, 165.

BILLS OF PEACE, 415-418.
assertion of a common right, 415, 416, 417.
vexatious litigation of same claim, 418.

BILLS TO ESTABLISH WILLS, 574.
to perpetuate testimony, 573.
to remove a cloud from title, 575.

BONA FIDE PURCHASER, 25, 171.
plea of, 275.
can be used by the holder of equitable title, 264, 276.

BOND, DEFENCE OF, IN CASES OF FRAUD, 260.
lost, 177.
profert of, 177.

BOUNDARIES, JURISDICTION OF EQUITY IN CASES OF CONFUSION OF, 32, 503.

BREACH OF TRUST, REMEDIES FOR, 147.

CALENDAR, CHANCERY, CASES FROM, 8

CANCELLATION, 31, 473, 475.
as applied in rescission of voidable contracts, 473.
independent of rescission, 474.

CASE, ORIGIN OF ACTIONS ON THE, 7.

CHANCELLOR, POSITION OF, 6.
origin of his extraordinary jurisdiction, 7.
was secretary of king, 6.
probably secretary of council, 6.

CHANCERY CALENDAR, CASES FROM, 8.

CHANCERY, HIGH COURT OF, RISE AND PROGRESS OF, 1–12.
ordinary jurisdiction of, 7 *note.*
courts of, abolished in some of the States, 14.

CHARITABLE USES, NATURE OF, 116.
importance of, 117.
origin of, 118.
Baptist Church *v.* Hart's Ex'rs., 118.
Vidal *v.* Girard's Ex'rs., 118.
statute of Elizabeth as to, 119.
characteristics of, 125.

CHARITIES, TRUSTS FOR, 20, 116–134.
classification of, 120.
for eleemosynary purposes, 120.
for educational purposes, 121.
for religious purposes, 122.
for public purposes, 123.
definition of, 124.
Jackson *v.* Phillips, 124.
cy pres doctrine in, 125, 126.
Baliol College Case; Ironmongers' Case, 126.
Jackson *v.* Phillips, 126.
[See *Cy Pres.*]
uncertainty of, 131.
Ellis *v.* Selby, 131.
Morice *v.* The Bishop of Durham, 131.
Attorney-General *v.* Soule, 131.
resulting trusts in cases of, 89, 132.
Shetford School Case, 132.
not subject to rules as to perpetuities, 133.

CHATTELS, SPECIFIC DELIVERY OF, 368.

CHEIF JUSTICIARY, 5.

CHOSES IN ACTION, ASSIGNMENT OF, 22.
not assignable at common law, 162.
exceptions, 163.
assignee of, takes subject to equities, 171.
can be sued upon in name of assignor, 172. [See ASSIGNMENTS.]

CLERGYMEN, GIFTS TO OR CONTRACTS WITH, WHEN VOIDABLE, 237.

CLOUD ON TITLE, BILLS TO REMOVE, 575.

COMMISSIONS TO EXAMINE WITNESSES ABROAD, 35, 367.

COMMITTEE OF LUNATIC, APPOINTMENT AND POWERS OF, 555.

COMMON INJUNCTION, 405.

COMMON PLEAS, 4.

COMPENSATION, SPECIFIC PERFORMANCE WITH, 388–389.
Sir Hugh Cairns's Act, 395, 477.
none in equity except as incidental to other relief, 476.
no uniform rule in the United States, 478.

COMPENSATION OF TRUSTEES, 144.

COMPROMISES IN EQUITY, 189.

CONCURRENT JURISDICTION OF EQUITY IN CASES OF FRAUD, 200.

CONDITIONAL SALES, DISTINCTION BETWEEN, AND MORTGAGES, 154.

CONFIDENTIAL COMMUNICATIONS, DISCLOSURE OF, RESTRAINED BY INJUNCTION, 427, 563.
will be protected though no litigation is in contemplation, 563.
though made to unprofessional advisers if with reference to litigation, 563.

CONFIRMATION OF FRAUDULENT TRANSACTIONS, 259.

CONFUSION OF BOUNDARIES, JURISDICTION OF EQUITY IN CASES OF, 32, 303.

CONNECTICUT, EQUITABLE JURISDICTION OF THE COURTS IN, 15, *note*.

CONSIDERATION, INADEQUACY OF, 219.
what, necessary in cases of specific performance, 372.
valuable, 372.
meritorious, 373.

CONSIMILI CASU, WRITS IN, 8.

CONSTITUTION OF THE UNITED STATES, PROVISIONS OF, AS TO EQUITABLE JURISDICTION, 13.

CONSTRUCTIVE FRAUD—MODERN CRITICISM UPON THE TERM, 205.

CONSTRUCTIVE TRUSTS, 20, 91-95.
trustee cannot acquire rights antagonistic to *cestui que trust*, 92.
extent of this rule, 93.
trustee cannot buy at his own sale, 94.
other constructive trusts, 95.
may arise under contracts, 95.
do not fall under the statute of frauds, 95, 218.
trusts *ex maleficio* a species of, 91, 210, 218.

CONTRACTS BETWEEN HUSBAND AND WIFE, 114.
for separation, 115.

CONTRIBUTION, 27, 328-330.
most frequent in case of sureties, 328.
none at law originally, 329.
general rules as to, 330.
between realty and personalty in decedents' estates, 349.

CONVERSION, 307-321.
general nature and extent of the doctrine of, 307.
example of; Fletcher *v.* Ashburner, 308.
may take place either under a trust or under a contract, 309.
what language is necessary to effect a, 310.
in what ways a trust for, may be imperative, 311.
question one of intention, 312.
contract to work a, must be binding, 313.
general results of, 314.
qualifications, 314.
failure of purposes of, 315.
resulting trust, 315.
Ackroyd *v.* Smithson; Smith *v.* Claxton, 316.
"out and out," 317.
doctrine in the United States on this subject, 318.
under instruments *inter vivos*, 319.

CONVERSION—*Continued.*
time from which it takes place, 320.
Clarke *v.* Franklin, 320.
under optional contracts, 321.

CONVERSION AS APPLIED TO PARTNERSHIP REAL ESTATE, 511.
rule in England, 511.
in the United States, 512.
qualification of the rule as to, 513.

COPYRIGHT, INJUNCTIONS IN CASES OF, 450–452.
none at common law after publication, 450.
in this country depends on Acts of Congress, 451.
piracy, 452.
none in immoral publications, 453.

CORPORATIONS, INJUNCTIONS TO RESTRAIN DESTRUCTIVE TRESPASS BY, 437.
nuisance by, 443.
jurisdiction of equity over, by injunction, 465.
bills against directors of, 527.

CORRECTION. See Reformation.

COUNCILS OF THE KING, 3.

COURT OF APPEAL IN ENGLAND, CONSTITUTION OF, 11, *note.*

COURT OF CHANCERY, ORDINARY JURISDICTION OF, 7, *note.*
rise and progress of, 1–12.

COVENANTS FOR FURTHER ASSURANCE, SPECIFIC PERFORMANCE OF, 367.

COVENANTS, SPECIFIC PERFORMANCE OF NEGATIVE, 398.
injunctions in cases of breach of, 461.
instances in which injunctions have been issued, 463.
negative quality imported into affirmative, 464.
no interference *quia timet* in certain cases of, 572.

CREDITORS' BILLS, 33, 525–528.
are of two classes, 525.
against a debtor during lifetime, 526.
supply the deficiencies in common-law executions, 527.
in the nature of an equitable levy, 527.
in cases of directors of corporations, 527.
of the second class. [See Administration Suits], 528.

CREDITORS, FRAUD ON. [See Fraud], 240–249.

CRIME, DISCOVERY AS TO, NOT COMPELLABLE, 562.

CROPS, MORTGAGES OF FUTURE, 165 (page 217, *note* 1).

CURIA REGIS, 4.
meaning of, 3.
application to, 7.

CY PRES, DOCTRINE, 126.
Jackson *v.* Phillips, 127.
in England, 128.
The Mayor of Lyons *v.* The Advocate General of Bengal, 128.
in the United States, 130.
Fontaine *v.* Ravenel, 130.
Lorings *v.* Marsh, 130.

DAMAGES. See COMPENSATION; LIQUIDATED DAMAGES.

DE BENE ESSE, BILLS TO TAKE TESTIMONY, 35, 567.

DEBTS, ASSETS FOR PAYMENT OF, AT COMMON LAW, 532.
in equity, 532.

DECEDENTS' ESTATES, APPLICATION OF THE DOCTRINE OF MARSHALLING TO, 345.
order in which assets of, are applied to the payment of debts, 346.
exoneration of pensonal estate, 347, 348, 349.

DECLARE FUTURE RIGHTS, BILL MERELY TO, WILL NOT LIE, 571.

DECREE, DIFFERENCE BETWEEN, AND JUDGMENT, 7.

DEEDS, DEPOSIT OF, 357.

DEFINITION OF EQUITY, 1.

DELAWARE, COURT OF CHANCERY IN, 15, *note*.

DELAY, 203, 259, 260.

DEPOSIT OF TITLE DEEDS, MORTGAGE BY, 357.

DESTRUCTIVE TRESPASS, 433–437.

DILIGENCE IN CASES OF SPECIFIC PERFORMANCE, 392.
in cases of fraud, 203, 259, 260.

DIRECTORS OF COMPANIES, 238, *note* 1.
bills against, 537.

DISABILITIES OF TRUSTEES, 94, 143.

DISCOVERY, 35, 556–565.
defects in common law as to, statutory changes, 556.
origin and nature of bills of, 557.
must be in aid of legal proceedings, 559.
general rights of complainant in bills of, 560.
in bills of, defendant need not answer as to his own title, 561.
or as to evidence thereof, 561.
in bills of, defendant need not criminate himself, 562.
of confidential communications cannot be compelled, 563.
of State secrets, cannot be compelled, 564.
whether in bills of, courts will go on to give relief, 565.

DISSOLUTION, BILLS FOR PARTNERSHIP ACCOUNT NEED NOT PRAY, 508.
of partnership, causes for, 509.

DOCUMENTS, RULES AS TO PRODUCTION OF, 566.

DONATIO MORTIS CAUSA, 70.

DOWER, 32, 494–502.
nature of, 494.
remedy by bill in equity for, 495.
disadvantage of proceeding at common law, 496.
advantages of procedure in equity, 497.
accouut of mesne profits, 498.
multiplicity of suits avoided, 499.
out of equitable estates, 500.
manner of assigning, 502.

DRAFT NOT AN ASSIGNMENT, 167.

DRUNKENNESS, FRAUD ARISING FROM, 230.

DURESS, FRAUD ARISING FROM, 230.

EDUCATION OF INFANTS, 548.

EDWARD I., ORDINANCE OF, AS TO MATTERS OF GRACE, 7.

EJECTMENT BILLS, 37.

ELECTION, 25, 295–306.
definition of, 295.
express and implied, 296.
distinction between the two, and importance thereof, 297.
Sheddon *v.* Goodrich, 297.

ELECTION—*Continued.*
circumstances under which the doctrine arises, 298.
after-acquired lands, 299.
powers, 300.
donor must give property of his own, 301.
property of the donee must be also given, 302.
gifts must be by the same instrument, 303.
manner in which it may be made, 304.
consequence of, is compensation, not forfeiture, 305.
application of doctrine of, to cases of creditors, 306.
Kidney *v.* Coussmaker, 306.
in cases of re-conversion, 325.
between remedy at law and bill in equity, 363 (page 423, *note* 1).

EQUALITY IS EQUITY, 41.

EQUITABLE ASSETS, 531–534.
doctrine of, not now important, 531.
origin of, 532.
Silk *v.* Prime, 533.
Cook *v.* Gregson, 534.

EQUITABLE ESTATES, RULES AS TO DEVOLUTION OF, 60.
exceptions, 62.
alienation of, 61.
liability of, for debts, 61.
may sometimes arise out of fraud, 198.
[See TRUSTS.]

EQUITABLE ESTOPPEL. [See ESTOPPEL], 280–294.

EQUITABLE JURISDICTION, GENERAL OUTLINE OF, 16, 19.

EQUITABLE MORTGAGES, 161.

EQUITABLE REMEDIES, EXAMPLE, 19.

EQUITABLE RIGHTS, EXAMPLE, 18.

EQUITABLE TITLES, EXAMPLE, 17.
under trusts, 49.
under mortgages, 149.
under assignments, 162.

EQUITABLE WASTE, 434.

EQUITY, DEFINITION OF, 1.
meaning of, 11.
follows the law, 38.
importance of historical view of, 2.
progressive capacity of, 583.

EQUITY OF REDEMPTION, 21, 150, **151.**
origin of, 150.
nature of, 151.

EQUITY TO A SETTLEMENT, 109–113.
Elibank *v.* Montolieu, 109.
nature of, 96.
how enforced, 110.
how waived, 111.
to what property it attaches, 112.
against whom and in whose favor, 113.
maintenance of wife, 113.

ESTABLISH WILLS, BILLS TO, 574.

ESTOPPEL, 25, 280–294.
definition of, 280.
different kinds of, 281.
legal estoppels *in pais*, 281.
by conduct, or equitable estoppel, 282.
by assertion of untruth, 283.
Congregation *v.* Williams, 283.
by concealment of truth, 284.
Pickard *v.* Sears, 284.
conduct which works an, must be external to the transaction, 285.
representations between party alleging estoppel and party estopped, 286.
and third party, 287.
must be known to be false, by party making them, 288.
must operate to deceive the party to whom they are made, 289.
intention that conduct should be acted on must exist, 290.
Cornish *v.* Abingdon; Manufacturers' Bank *v.* Hazard, 290.
must be actually produced by the conduct, 291.
is limited to representations made, 292.
in cases of married women and infants, 293.
binds parties and privies, 294.
arises when credit is induced to be given by representation; In re Agra and Masterman's Bank, 294.

EVIDENCE IN EQUITY, HOW TAKEN, 9.

EVIDENCE, TO JUSTIFY RELIEF IN CASES OF MISTAKE, 196.

EVIDENCE, ADMISSIBILITY OF PAROL IN CASES OF FRAUD, 258.
of reformation, 470.

EXAMINATIONS *DE BENE ESSE*, 35, 567.

EXCHEQUER, ORIGIN OF COURT OF, 4.
equitable jurisdiction of, 5, *note*.

EXCLUSIVE JURISDICTION OF EQUITY IN CASES OF FRAUD, 201.

EXECUTED TRUSTS, 20, 57.

EXECUTION, 61.
liability of equitable estates to, 61.

EXECUTION OF TRUSTS BY STATUTE, 55.
in common law in some States, 55.
Pennsylvania doctrine, 55.

EXECUTIONS AT COMMON LAW, INEFFICIENCY OF, 526.

EXECUTORS CANNOT MAKE A PROFIT AT EXPENSE OF THE ESTATE, 93.
contracts with, when voidable, 237.

EXECUTORY-TRUSTS, 20, 57.

EXONERATION, 27, 331–333.
not originally enforceable at law, **331.**
in estates of decedents, 347.
of general personal estate, 347.
by implication, 348.

EX MALEFICIO TRUSTS, 91, 210, 218.

EX PARTE INJUNCTIONS, 400.

EXPRESS TRUSTS, 20, 63, 65.

EXTRAORDINARY JURISDICTIONS OF CHANCELLOR, ORIGIN OF, 7.
cases in which it was exercised, 8.
progress of, 10.

FAMILY ARRANGEMENTS, 189, 220.

FATHER AND CHILD, JURISDICTION OF EQUITY IN CASES OF, 546, 547.
contracts between, 235.

FEDERAL COURTS, EQUITABLE JURISDICTION OF, 13.

FEMES COVERTE. See MARRIED WOMEN.

FIDEI COMMISSA, NATURE OF, 50.

FIDUCIARY RELATION, FRAUD PRESUMED FROM, 236-239.

FLORIDA, EQUITABLE JURISDICTION OF THE COURTS IN, 15 *note.*

FOLLOWING TRUST FUNDS, 86.

FORECLOSURE, 21, 156.

FORFEITURES, 181.
will not be enforced in equity, 181.
Oil Creek R. R. Co. *v.* Atlantic and Great Western R. R. Co., 181.

FRAUD, 24, 197–260.
Lord Hardwicke's division of, 24.
importance of equitable jurisdiction in cases of, 197.
general nature of equitable jurisdictiou in cases of, 197.
distinctions between relief at law and in equity, 198.
sometimes party injured by, has an equitable estate, 198.
limitations upon equitable jurisdiction, 199.
in obtaining a will, 199.
Allan *v.* McPherson, 199.
concurrent jurisdiction of equity in cases of, 200.
exclusive jurisdiction of equity in cases of, 201.
transactions tainted with, voidable, not void, 202.
laches, 203, 260.
transactions tainted by, must be adopted or set aside *in toto*, 204
general division of the subject of, 205.
modern doctrine as to constructive, 205.
Chesterfield *v.* Jansen, 205.
actual, general nature of, 206.
matters of opinion, 207.
prospectuses of projected companies, 208.
puffing, 209.
on owner of property sold at auction, 210.
by deterring bidders by representations that bid is made for a party beneficially interested, 210.
matters of intention, 211.
of law, 212.
suppressio veri, 213.
knowledge by party making representations, 214.
party has no right to assert what he does not know to be true, 214.
representation must be relied on, 215.
material, 216.
party must be injured by, 217.
by agent, 217.
trusts *ex maleficio* arise from, 218.
Cook *v.* Cook, 218.
arising from intrinsic nature of the transaction, 219–229.
inadequacy of consideration, 219.

FRAUD—*Continued.*
bargains by reversioners and expectant heirs, 220.
change of the law in England, 221.
usurious contracts, 222.
gambling contracts, 223.
subject-matter of contracts when void, 224.
gifts in restraint of marriage, 225.
condition in restraint of marriage, 226.
partial restraint of marriage, 227.
in restraint of trade, 228.
sales of public offices, 229.
presumed from relations of parties, 230–239.
mental disability, 230.
drunkenness, 230.
duress, 230.
gifts made under undue influence, 231.
contracts made under undue influence, 232.
parties between whom confidential relations exist. 233.
guardian and ward, 234.
parent and child, 235.
solicitor and client, 236.
trustee and *cestui que trust*, 237.
fiduciary can make no profit, 238.
promoters of companies, 239.
third parties affected by, 240–257.
on creditors, 240.
stat. of 13 Elizabeth, c. 5, 241.
jurisdiction of equity in cases under the statute, 242.
conveyance must be for a good consideration, 243.
and *bona fide*, 243.
moral obligations, 244.
consideration of marriage, 244.
voluntary transfers, 245.
conveyances by persons indebted, 245.
conveyances of property which could not be reached by execution, 246.
gifts from husband to wife, 247.
parties by whom fraudulent conveyances may be avoided, 248.
secret agreement touching composition deeds, 249.
upon purchasers, 250.
stat. 27 Elizabeth, c. 4, 250.
difference between English and American rule, 251.
statute not applicable to personal property, 252.
on marital rights, 253.
ignorance of husband as to existence of property immaterial, 254.
circumstances which constitute fraud on marital rights, 255.
on powers, 256.
appointment must be made solely to carry out the power, 257.

FRAUD—*Continued.*
admissibility of parol evidence in cases of, 258.
confirmation of fraudulent transaction, 259.
release, 259.
acquiescence, 259.
laches, 260.
bona fide purchaser, 260.

FRAUDS, STATUTE OF, EFFECTS OF IN CASES OF REFORMATION, 470.
in cases of trusts, 64.
in cases of specific performance, 383–387.
[See STATUTE OF FRAUDS.]

FUTURE ADVANCES, MORTGAGES TO SECURE, 159.

FUTURE CROPS, MORTGAGES OF, 165 (page 217, *note* 1).

FUTURE PROPERTY, ASSIGNMENTS OF, 165.

GAMBLING CONTRACTS, 223.

GENERAL AVERAGE, 334.

GEORGIA, EQUITABLE JURISDICTION OF THE COURTS IN, 15, *note*.

GIFTS, 114.
from husband to wife, 114.
as regards creditors, 247.
in trust, 66.
between parties in fiduciary relation, 231.

GRACE, JURISDICTION OF COUNCIL IN MATTERS OF, 7.

GUARDIAN AND WARD, TRANSACTIONS BETWEEN, 234.

GUARDIANS.
at common law and by statute, 541.
necessity for jurisdiction of equity over, 542.
appointment and removal of, 546.

GUARDIANSHIP, A FATHER'S *DUTY* NOT *PRIVILEGE*, 547.

HEIRS, BARGAINS BY EXPECTANT, 220.

HUSBAND CANNOT MAKE PROFIT AT WIFE'S EXPENSE, 93.

HUSBAND AND WIFE. See MARRIED WOMEN.

IDIOTS AND LUNATICS, 34, 551–555.
nature and origin of equity jurisdiction over, 551.
statutes of Edward II. as to, 552.
in the United States, 553.
method of procedure in cases of, 554.
appointment and powers of committee, 555.

IGNORANCE OF LAW. See MISTAKE; FRAUD.

ILLINOIS, EQUITABLE JURISDICTION OF THE COURTS IN, 15, *note.*

IMPLIED TRUSTS, 20, 78.
of two kinds, resulting and constructive trusts. [See RESULTING TRUSTS; CONSTRUCTIVE TRUSTS], 78.

INADEQUACY OF CONSIDERATION, 219.

INFANTS, JURISDICTION OF CHANCERY OVER, 34, 541–550.
guardianship of, at common law, 541.
necessity for jurisdiction of chancellor over, 542.
made wards of court, 543.
to be wards of court, must have property, 544.
proceedings in cases of, may be by petition, 545.
appointment and removal of guardians of, 546.
custody of, 546.
guardianship of, a father's *duty*, not *privilege*, 547.
education of, 548.
management of estate of, 549.
marriage of, 550.
when bound by estoppel, 293.

INFRINGEMENT OF COPYYIGHT. See COPYRIGHT.
of patent-right. See PATENT-RIGHT.

INJUNCTIONS, 30, 399–465.
definition of, 399.
mandatory aud prohibitory, 400.
mandatory, 400.
prohibitory, 401.
character of equitable remedy by, 402.
classification of, 403.
interlocutory and perpetual, 403.
ex parte or at the hearing, 404.
common or special, 405.
to restrain proceedings at law. [See INJUNCTIONS TO RESTRAIN PROCEEDINGS AT LAW], 407–414.
bills of peace. [See BILLS OF PEACE], 415–418.

INJUNCTIONS—*Continued.*
bills of interpleader. [See INTERPLEADER], 419–422.
in aid of proceedings in bankruptcy, 423.
in what courts proceedings will be restrained by, 424.
in cases of trusts and mortgages, 425.
between partners, 426.
to restrain disclosure of confidential communications, 427.
to protect legal rights, 428–465.
in cases of waste. [See WASTE], 429–434.
in cases of destructive trespass. [Soe TRESPASS], 435–437.
in cases of nuisance. [See NUISANCE], 438–443.
in cases of patent-right. [See PATENT RIGHT], 444, 448, 449.
in cases of copyright. [See COPYRIGHT], 450, 452.
in cases of literary property. [See LITERARY PROPERTY], 454, 455.
in cases of trade-marks. [See TRADE-MARKS], 456–458.
in cases of alienation of negotiable securities, 459.
in cases of alienation pending litigation, 460.
in cases of breach of negative covenants. [See COVENANTS], 461–464.
in cases of corporations, 465.
issued under comnon-law forms in some States, 14.

INJUNCTIONS TO RESTRAIN PROCEEDINGS AT LAW, 407–414.
not in the nature of writs of prohibition, 408.
general nature of the jurisdiction, 409.
equitable titles protected by, 410.
equitable rights protected by, 411.
equitable remedies assisted by, 412.
vexatious litigation; election between remedies, 413.
after court has assumed jurisdiction of cause, 414.
in what courts proceedings may be restrained. 424

INTENTION, MATTERS OF, 211.

INTEREST, WHEN TRUSTEE CHARGEABLE WITH, 142.

INTERLOCUTORY INJUNCTIONS, 403.

INTERPLEADER, 419–422.
bill of, must show title in two claimants, 420.
complainant must claim no interest, 421.
debt or duty must be the same, 422.

INVESTMENTS, BY TRUSTEES, 140–141.

IOWA, EQUITABLE JURISDICTION OF COURTS IN. 15, *note.*

ISSUE, WHEN TRIED BY JURY, 9.

ITINERANT JUSTICES, 5

JUDGMENT, WHEN IT MAY BE KEPT ALIVE AFTER PAYMENT, 336.
of court of law, difference between and decree, 7,

JURISDICTION OF EQUITY, 37.
not ousted by assumption of jurisdiction by courts of law in similar cases, 37.
exercised *in personam*, although property is without the, 47.

KENTUCKY, COURTS OF CHANCERY IN, 15, *note.*

KING, COULD BE ASSIGNEE OF *CHOSE IN ACTION*, 163.

KING'S BENCH, COURT OF, 3, 5.

LABOR AND SUPPLY CLAIMS, WHEN ENTITLED TO PRIORITY OVER MORTGAGES, 344.

LACHES, 203.
rights barred by, in case of fraud, 260.
Michoud *v.* Girod; Gresley *v.* Mousley, 260.

LATERAL SUPPORT TO SOIL, 443.

LAW, INJUNCTIONS TO RESTRAIN PROCEEDINGS AT. [See INJUNCTIONS TO RESTRAIN PROCEEDINGS AT LAW], 407-414.

LAWFUL TRUSTS, 56.

LEGACIES. [See SATISFACTION], 203.

LIABILITY TO BE SUED CANNOT BE TRANSFERRED, 173.

LIENS, 28, 351-360.
distinction between those at common law and in equity, 351.
Frith *v.* Forbes, 351.
Ex parte Waring, 351.
instances of equitable, 352.
by bills of exchange, 352.
vendor's, for purchase-money, 353.
nature of, 354.
Macreth *v.* Symons, 354.
Gilman *v.* Brown, 354.
how waived, 355.
for and against whom it exists, 356.
deposit of title deeds, 357.
Russel *v.* Russel, 357.
mortgages of personalty, 358.
Holroyd *v.* Marshall, 358.
pledges, 359.
Jones *v.* Smith, 358.

LIENS—*Continued.*
Boyton *v.* Payson, 358.
in aid of equitable and legal rights, 360.
Ex parte Alston, 360.
Schotsmans *v.* Lancashire Railway, 360.

LIMITATIONS, APPLICABILITY OF STATUTES OF, TO CASES OF FRAUD, 203.

LIQUIDATED DAMAGES, 179.

LIS PENDENS, 274.
Murray *v.* Ballou, 274.

LITERARY PROPERTY, INJUNCTIONS TO RESTRAIN INFRINGEMENT OF, 454, 455.
nature of, 454.
when lost by publication, 455.

LITIGATION, INJUNCTIONS TO RESTRAIN VEXATIOUS, 413

LOST INSTRUMENTS, RELIEF IN CASES OF, 177.

LUNATICS, NATURE AND ORIGIN OF JURISDICTION OF EQUITY OVER, 34, 551.
statute of Edward II. as to, 552.
jurisdiction as to, in the United States, 553.
method of procedure in cases of, 554.
appointment and powers of committee of, 555.

MAGNA CHARTA, PROVISION AS TO COURT OF COMMON PLEAS IN, 4.
forbids justice to be sold, 6.

MAINE, EQUITABLE JURISDICTION OF THE COURTS IN, 15, *note.*

MANDATORY INJUNCTIONS, 400.

MARITAL RIGHTS, FRAUDS UPON, 253–255
Strathmore *v.* Bowes, 253.

MARRIAGE, CONTRACTS IN RESTRAINT OF, 224.

MARRIAGE-BROKERAGE CONTRACTS ILLEGAL AND VOID, 224.

MARRIAGE, GIFTS IN RESTRAINT OF, CIVIL LAW RULE AS TO, 225.
origin of rule as to, 225.
Stackpole *v.* Beaumont, 225.
gifts in *entire* restraint of, 226.

MARRIAGE—*Continued.*
gifts in *partial* restraint of, 227.
Newton *v.* Marsden, 227.
gifts in restraint of second marriage of man; Allen *v.* Jackson, 227.

MARRIED WOMEN, TRUSTS FOR, 20, 96–115.
rights of husband at common law, 96.
statute of 1882 in England, 97.
trusts for sole and separate use of, 98.
trustee not necessary, 99.
no particular words necessary, 100.
power of, over separate estate, 101.
liability of separate estate, to engagements of, 102.
rules in United States, 103.
restraint on anticipation by, 104.
for whom trusts may be created, 105.
rules in the United States, 106.
Lewin's propositions, 107.
pin-money trusts, 108.
wife's equity to a settlement, 109.
how enforced, 110.
how waived, 111.
to what property it attaches, 112.
against whom, 113.
in whose favor, 113.
gifts from husband to wife, 114.
contracts for separation, 115.

MARRIED WOMEN, WHEN ESTOPPED IN EQUITY, 293.

MARSHALLING, 27, 340–350.
two methods of applying the doctrine, 341.
application in cases of bankruptcy, 343.
Greenwood *v.* Taylor, 343.
rule in Fosdick *v.* Schall, 344.
to estates of decedents, 345.
will not take place in favor of a charity, 350.
Mogg *v.* Hodges, 350.

MASSACHUSETTS, EQUITABLE JURISDICTION OF COURTS IN, 15, *note.*

MAXIMS IN EQUITY, 37–48.
no right without a remedy, 37.
no remedy in equity when the remedy at law is complete, 37.
no remedy in equity merely because legal remedy has failed in a particular case, 37.

MAXIMS IN EQUITY—*Continued.*
no remedy in equity when municipal law cannot take cognisance of the right, 37.
no remedy in equity in contravention of a positive rule of law, 37.
no remedy in equity when the amount involved is trivial, 37
equity follows the law, 38.
vigilantibus non dormientibus æquitas subvenit, 39.
between equal equities the law will prevail, 40.
equality is equity, 41.
he who comes into equity must do so with clean hands, 42.
he who seeks equity must do equity, 43.
equity looks upon that as done which ought to be done, 44.
between equal equities priority of time will prevail, 45.
equity imputes an intention to fulfil an obligation, 46.
equity acts *in personam*, 47.
suits in reference to property beyond the jurisdiction, 47.
equity acts specifically, 48.

MEDICAL ADVISERS, CONTRACTS WITH WHEN VOIDABLE, 237.

MENTAL DISABILITY, FRAUD ARISING FROM, 230.

MERGER OF MORTGAGES SOMETIMES PREVENTED IN EQUITY. 160.

MESNE PROFITS, IN DOWER, 498.

MICHIGAN, EQUITABLE JURISDICTION OF THE COURTS IN, 15, *note.*

MINES, PARTNERSHIP IN, 520.

MISREPRESENTATION, IN CASES OF MISTAKE, 188.
knowledge by party making, 214.
must be relied on, 215.
must be material, 216.
party must be injured by, 217.
by agent, 218.

MISSISSIPPI, COURTS OF CHANCERY IN, 15, *note.*

MISTAKE, 23, 184–196.
equitable remedies in cases of, 184.
definition of, 185.
two kinds of, of law and of fact, 186.
of law—Hunt *v.* Rousmaniere, 187.
Rogers *v.* Ingham, 187.

MISTAKE—*Continued.*
misrepresentation and surprise, 188.
compromise of doubtful rights, 189.
of fact—different kinds, 190.
requisites to, 191.
in execution of powers, 192–195.
miscellaneous cases, 196.

MORAL OBLIGATIONS, 244.

MORTGAGE, RIGHTS OF SUCCESSIVE PURCHASERS OF PARCELS OF LAND COVERED BY, 333.

MORTGAGEE, RIGHTS AND DUTIES BETWEEN MORTGAGOR AND, 157.
cannot make a profit at expense of mortgagor, 93.
when postponed to labor and supply claimants, 344.

MORTGAGES, 21, 149–161.
law of, no longer peculiar to equity, 149.
nature of, 150.
equity of redemption, 151.
is an estate, 151.
Roscarrick *v.* Barton, 151.
Casborne *v.* Scarfe, 151.
origin of equity of redemption, 150.
nature of equity of redemption, 152.
Cook *v.* Gregson, 152.
once a mortgage always a mortgage, 153.
distinction between and conditional sales, 154.
absolute deed may be shown to be a mortgage, 155.
foreclosure suits, 156.
tacking, 158.
consolidation of, 158, *note* 4.
to secure future advances, 159.
Brace *v.* The Duchess of Malborough, 159.
merger of, sometimes prevented in equity, 160.
equitable, to be considered under liens, 161.
of personalty, 258.

MORTGAGOR, NATURE OF HIS TITLE IN ENGLAND, 152.
in the United States, 152.
rights and duties between mortgagee and, 157.

MORTMAIN, STATUTES OF, 134.

MULTIPLICITY OF SUITS, 415 *et seq.*

NE EXEAT, WRIT OF, 14, 36, 581.

NEGATIVE COVENANTS, SPECIFIC PERFORMANCE OF, 398.
injunctions in case of breach of. [See COVENANT], 461–463.

NEGLIGENCE, WILL BAR RELIEF IN CASES OF MISTAKE, 191.

NEGOTIABLE SECURITIES, INJUNCTION IN CASES OF ALIEN ATION OF, 429.

NEW HAMPSHIRE, EQUITABLE JURISDICTION OF COURTS IN, 15, *note.*

NEW JERSEY, EQUITABLE JURISDICTION OF COURTS IN, 15 *note.*

NEW YORK, COURTS OF CHANCERY ABOLISHED IN, 14.

NORTH CAROLINA, EQUITABLE JURISDICTION OF COURTS IN, 15. *note.*

NOTICE, 25, 261-273.
doctrine of, not applicable to contests between purely legal titles, 261.
applicable to equitable titles, 262.
Le Neve *v.* Le Neve, 262.
definition and illustration of, 263.
who may avail himself of want of, 264.
Phillips *v.* Phillips, 264.
Basset *v.* Nesworthy, 264.
Wallyn *v.* Lee, 264.
Joyce *v.* De Moleyns, 264.
Williams *v.* Lambe, 264.
Collins *v.* Archer, 264.
Finch *v.* Shaw, 264.
extent of protection afforded by want of, 265.
English rule as to time of notice, 266.
rule in the United States, 267.
is either actual or constructive, 268.
actual notice either direct or implied, 268.
actual, 268.
notice to agent is notice to principal, 268.
case of Distilled Spirits, 268.
possession is notice, 268.
Holmes *v.* Powell, 268.
Billington *v.* Welsh, 268.
constructive, 269.
Vice-chancellor Wigram's division, 269.
Penny *v.* Watts, 269.
Birch *v.* Elames, 269.
by registeration, 270.
what registeration will amount to, 271.
effect of actual notice of unregistered conveyance, 272.
constructive notice of same, 273.

NOTICE—*Continued.*
of equitable assignments, 168.
when necessary, 168.
to whom given, 168.
authorities in United States as to, conflicting, 169.

NUISANCE, INJUNCTIONS IN CASES OF, 438–443.
remedies at common law for, 439.
how far title at law must be established in bills to enjoin a, 440.
different kinds of, 441
coming to a, 442.

NUNS, GIFTS TO CONVENT BY, 237 (page 299, *note* 1).

OFFICES, CONTRACTS FOR SALE OF, 229.

OPINION, MATTERS OF, IN RELATION TO FRAUD, 207.

ORDER ON A FUND, WHEN AN ASSIGNMENT, 167.

ORDINARY COUNCIL, 4.

ORDINARY JURISDICTION OF THE COURTS OF CHANCERY, 7, *note.*

OREGON, EQUITABLE JURISDICTION OF THE COURTS IN, 15, *note.*

OWELTY IN PARTITION, IN EQUITY, 492.

PARENT AND CHILD, TRANSACTIONS BETWEEN. [See INFANT], 235.

PAROL EVIDENCE, ADMISSIBLE TO ESTABLISH RESULTING TRUST, 83.
when admissible in cases of reformation of written instruments, 470.
admissibility of, in cases of fraud, 258.

PAROL VARIATIONS OF WRITTEN CONTRACTS, 381.

PARTITION, 32, 487–493.
origin of chancery jurisdiction in cases of, 487.
disadvantages of common-law action of, 488.
changes by statute in the United States, 488.
advantages of the equitable method, 489.
mode of, in equity, 490.
difficulty of making, no objection to decree for, 491.
power to award owelty in cases of, 492.
power to order a sale under statutes, in cases of, 493.

PARTNER CANNOT MAKE PROFIT AT EXPENSE OF CO-PARTNER, 93

PARTNERS, INJUNCTIONS BETWEEN, 426.

PARTNERSHIP, 33, 505–524.
reason for equitable remedy in cases of, 505.
nature of contract of, 506.
bills for account need not pray dissolution of, 508.
causes of dissolution of, 509.
preservation of property of, 510.
doctrine of conversion as applied to real estate of, 511.
rule in England, 511.
in the United States, 512.
qualifications of rule as to, 513.
sale and account in cases of, 514.
winding up of, 515.
separate assets applied to payment of separate debts, 516.
English rule, 517.
rule in Tucker *v.* Oxley, 518.
effect of bankrupt act of 1867, 519.
joint and separate executions, 522.
suits between different, having a common member, 523.
in case of mines, 524.

PART PERFORMANCE, 384–385.

PASSIVE TRUSTS, 20, 54.

PATENT RIGHT, INJUNCTIONS IN CASES OF, 444, 446, 448, 449.
inspection in cases of, 445.
account in cases of, 447.
previous trial at law to establish, unnecessary, 449.

PEACE, BILLS OF. [See Bills of Peace], 415–418.

PENALTIES, WHEN EQUITY WILL RELIEVE AGAINST, 178, 180.
discovery which will subject defendant to, not compellable, 562.

PENNSYLVANIA, COLONIAL COURT OF CHANCERY IN, 14, *note.*
equitable jurisdiction of the courts in, 15, *note.*

PERFORMANCE, DOCTRINE OF, 535–537.
covenant to settle and subsequent purchase, 536.
covenant to pay and subsequent intestacy, 537.

PERPETUAL INJUNCTIONS, 403.

PERPETUATE TESTIMONY, BILLS TO, 35, 573.

PERPETUITIES, 133.

PERSONAL PROPERTY LIMITED IN REMAINDER, BILLS *QUIA TIMET* IN CASES OF, 570.

PIN-MONEY, TRUSTS FOR, 108.
Howard *v.* Digby, 108.

PIRACY, IN CASES OF COPYRIGHT, 452.

PLEADINGS IN EQUITY, 9.

PLEDGES, 359.

POSSESSION, 268.
when notice, 268.
when case taken out of statute of frauds by, 384.

POWERS, DEFECTIVE EXECUTION OF, EQUITY JURISDICTION IN CASE OF, 182, 192.
what defects in execution of, remedied, 193.
for whose benefit, 194.
against whom, 195.

POWERS, ELECTION IN CASES OF, 300.
fraud on, 256, 257.
Aleyn *v.* Belcher; Lane *v.* Page, 256.
Lee *v.* Fernie; Topham *v.* The Duke of Portland, 257.

POWERS IN TRUST, 20, 77.

PRECATORY WORDS, CREATION OF TRUSTS BY, 20, 71.
doctrine in England, 72.
in the United States generally, 72.
in Pennsylvania and Connecticut, 72.
what will create a trust, 73.
are *prima facie* imperative, 74.
certainty of the object, 75.
certainty of the subject, 76.

PRESUMPTIVE TRUSTS. [See RESULTING TRUSTS, 79–90.

PRIVATE TRUSTS, 20.

PRIZE MONEY, 221.
contracts for sale of, when voidable, 221.

PROCEEDINGS AT LAW, INJUNCTIONS TO RESTRAIN, 407–414.

PRODUCTION OF DOCUMENTS, RULES AS TO, 566.

PROFERT, WHEN DISPENSED WITH IN EQUITY, 177.

PROHIBITORY INJUNCTIONS, 401.

PROMISE TO PAY OUT OF A FUND NOT AN ASSIGNMENT, 167.

PROMOTERS OF COMPANIES, 238, 239.
Tyrrell *v.* Bank of London, 238.

PROSPECTUS, FRAUD IN, 208.

PUBLIC COMPANIES, DESTRUCTIVE TRESPASS BY. [And see CORPORATIONS], 437.

PUBLIC OFFICES, SALES OF, 229.

PUBLIC TRUSTS, 20, 59.

PUFFING, 209.

PURCHASE-MONEY, APPLICATION OF, 277, 278, 279.

PURCHASER, *BONA FIDE*, 25, 171.
plea of, 275.
holder of equitable title may make use of plea of, 276.
in cases of fraud, 260.

PURCHASER, WHEN HE MAY BE COMPELLED TO TAKE, 389.
when he may elect to take, 390.

PURCHASERS, FRAUD ON, 250, 252.

PURPRESTURES, 443.

QUIA TIMET, BILLS, 14, 36, 568–572.
the general nature of, 568–572.
examples of, 569.
personal property limited for life with remainders over, 570.
will not be entertained solely to declare rights, 571.
no interference by, in certain cases of covenants, 572.

RAILROADS, MORTGAGES OF ROLLING STOCK OF, 165.
when mortgagees of, postponed to labor and supply claims, 344.

RECEIVERS, 14, 36, 576–580.
general nature of the jurisdiction as to, 576.
appointment of, a matter of discretion, 577.
rules as to, 577.

RECEIVERS—*Continued.*
cases in which court appoints, 578.
effect of appointment of, 579.
powers and duties of, 580.
in partnership cases, 510.
in creditor's bills, 527.

RE-CONVERSION, 26, 322, 325.
may be by act of party or by act of law, 322.
how election may be manifested, 323.
by whom election may be made, 324.
by operation of law, 325.
Chichester *v.* Bickerstaff, 325.

RECORD COMMISSION, 118.

REDEMPTION, EQUITY OF, 21, 150, 151.
origin of, 150.
nature of, 151.
rules as to, 151.

REDUCTION OF DEBT, AGREEMENT FOR, 180.

RE-EXECUTION OF LOST OR DESTROYED INSTRUMENTS, 31, 467.

REFORMATION, 31, 58, 468-471.
in cases of executory trusts, 58.
in cases of fraud and mistake, 468.
general principle in cases of, 469.
admissibility of parol evidence in cases of, 470.
under presumption of law, 471.

REGISTRATION, NOTICE BY, 270.
what will operate as notice, 271.
effect of actual notice of unregistered conveyance, 272.
Le Neve *v.* Le Neve, 272.

RELEASE OF FRAUD, 259.

REMEDY IN EQUITY, WHEN IT EXISTS, 37.

RENEWAL OF LEASEHOLDS, WHEN RESULTING TRUSTS ARISES UNDER, 93.

RENT, JURISDICTION OF EQUITY IN CASES OF, 32, 504.

REPLICATION, EFFECT OF, 9.

REPRESENTATIONS IN CASES OF ESTOPPEL. [See FRAUD], 286-292.

RESCISSION, 31, 239, 472.

RESTRAINT OF MARRIAGE, GIFTS IN, 225.
conditions in, 226.
partial, 228.
[See MARRIAGE, GIFTS IN RESTRAINT OF.]

RESTRAINT OF TRADE, CONTRACTS IN, 228.

RESTRAINT ON ALIENATION, 61.
in spendthrift trusts, 61.
in trusts for married women, 104.

RESULTING TRUSTS OF FOUR KINDS, 20, 79.
purchase-money paid by one, title taken in name of another, 80.
Dyer *v.* Dyer, 80.
requisites to such a trust, 81.
statute of frauds, 82.
parol evidence admissible, 83.
advancements, 84.
trusts of this kind abolished in some States, 85.
purchases by trustees with trust funds, 86.
when trustees mix trust funds with their own, 86.
may be proved by parol, 86.
where trust is not declared or fails, 87.
where beneficial interest is not exhausted, 88.
Barrs *v.* Fewkes, 88.
exceptions in favor of charities, 89.
conveyances without consideration, 90.
in cases of charities, 132.
from failure of purposes of conversion, 315.

REVERSIONERS, BARGAINS BY, 220.

REVOCATION, POWERS OF, IN VOLUNTARY SETTLEMENTS, 67.

RHODE ISLAND, EQUITABLE JURISDICTION OF THE COURTS IN 15, *note.*

ROLLING STOCK OF RAILROADS, MORTGAGES OF, 165.

SAILORS, WHEN CONTRACTS BY, FOR SALE OF PRIZE MONEY VOIDABLE, 220.

SALE IN PARTITION, 493.

SALES BY FIDUCIARIES, PARTIES MAKING CANNOT BID AT, 94, 143, 239.

SALES OF PUBLIC OFFICES, 229.

SATISFACTION, 538-540.
of debts by legacies, 538.
of legacies by legacies, 539.
of legacies by portions, 540.
of portions by legacies, 540.

SEPARATE DEBTS, APPLICATION OF SEPARATE ASSETS OF PARTNER TO PAYMENT OF, 516.

SEPARATE USE.
trusts for, 20, 98.
trustee not necessary, 99.
no particular words necessary, 100.
Nix *v.* Bradley, 100.
power of married woman over estate settled to, 101.
Taylor *v.* Meads, 101.
liability of estate to debts of *feme*, 102.
Johnson *v.* Gallagher, 102.
rules in the United States, 103.
Ewing *v.* Smith; Lancaster *v.* Dolan; Haines *v.* Ellis, 103.
restraints on anticipation, 104.
for whose benefit created, 105.
Massey *v.* Parker; Tullett *v.* Armstrong, 105.
rules in the United States, 106.
Lewin's propositions as to, 107.

SEPARATION, CONTRACTS FOR, BETWEEN HUSBAND AND WIFE, 115.
Wilson *v.* Wilson, 115.

SET OFF, 27, 327.

SETTLEMENT BY HUSBAND ON WIFE, MUST BE REASONABLE, 114, 247. [See EQUITY TO A SETTLEMENT.]

SHERIFFS HELD COUNTY COURTS, 4.

SOIL, LATERAL SUPPORT TO, 443.

SOLE AND SEPARATE USE. See SEPARATE USE,

SOLICITOR AND CLIENT, TRANSACTIONS BETWEEN, 236.
Newman *v.* Payne, 236.
Walmesley *v.* Booth, 236.

SPECIAL INJUNCTION, 405.

SPECIFIC PERFORMANCE, 14, 29, 361–398.
general nature of, 361.
of contracts for sale of real estate, 364.
may be enforced between original parties and those who claim under them, 365.
M'Creight *v.* Foster, 365.
of contracts as to real estate outside the jurisdiction, 366.
Penn *v.* Lord Baltimore, 366.
of covenants for further assurance, 367.
of contracts as to personal property, 368.
of contracts when damages cannot be ascertained, 369.
of other contracts, 370.
rests on discretion of the court, 371.
valuable consideration necessary to, 372.
meritorious consideration, 373.
adequacy of consideration, 374.
performance in specie must be necessary, 375.
must be in accordance with general equitable doctrines, 376.
contract must be mutual, certain, and practicable, 377.
purchaser not compellable to accept doubtful title, 378.
Pyrke *v.* Waddingham, 379.
other rules as to title, 380.
of written contracts with parol variations, 381.
Townsend *v.* Stangroom, 381.
Gillespie *v.* Moon, 382.
statute of frauds, 383.
exceptions, 383.
part performance, 384.
what constitutes, 385.
when reduction to writing is prevented by fraud, 386.
when parol contract is admitted in the answer, 387.
with compensation for defects, 388.
when the purchaser may be compelled to take, 389.
when he may elect to take, 390.
time to make out a title beyond the day, 391.
due diligence required, 392.
compensation, Sir Hugh Cairns's Act, 395.
doctrine in the United States, 396.
parties compelled to make good their representations, 397.
of negative covenants, 398,

STATED ACCOUNT, PLEA OF, 485.

STATE SECRETS DISCLOSURE OF, CANNOT BE COMPELLED, 564.

STATUTE OF FRAUDS, AS TO TRUSTS, 64.
does not require trust to be *created* by writing, 64.
personal chattels not within, 64.
implied trusts not within, 64.
no particular form of words necessary to satisfy, 64.
resulting trusts, 82.
in cases of specific performance. [See PART PERFORMANCE; SPECIFIC PERFORMANCE], 384, 385.

STATUTE OF USES, 53.

SUBPŒNA, WRIT OF, 9, 10.

SUBROGATION, 27, 335–339.
nature of right of, 335.
extent of doctrine of, 337.

SUPPLICAVIT, WRIT OF, 36, 582.

SUPPRESSIO VERI, 213.

SUPREME COURT JUDICATURE ACT, 1, 11.

SURCHARGE AND FALSIFY, IN CASES OF ACCOUNT, 486.

SURETY MAY COMPEL A CREDITOR TO MAKE A PROMPT USE OF REMEDIES, 339.

SURETIES, CONTRIBUTION BETWEEN, 328.

TACKING, 158.

TAX, INJUNCTIONS TO RESTRAIN COLLECTION OF, 424.

TENANT FOR LIFE CANNOT MAKE PROFIT AT EXPENSE OF REMAINDER MAN, 93.

TENANT IN COMMON, CANNOT MAKE PROFIT AT EXPENSE OF CO-TENANT, 93.

TENNESSEE, COURTS OF CHANCERY IN, 15, *note.*

TESTIMONY *DE BENE ESSE*, BILLS TO TAKE, 567.

TEXAS, EQUITABLE JURISDICTION OF THE COURTS IN, 15, *note.*

TIME TO MAKE OUT TITLE BEYOND THE DAY, 391.

TITLE, BILLS TO REMOVE A CLOUD FROM, 575.
defendant need not discover his own, 561.
nor evidence thereof, 561.
purchaser not compellable to accept doubtful, 378.
time to make out, in cases of specific performance, 391.

TRADE, CONDITIONS IN RESTRAINT OF, 228.

TRADE-MARKS, INJUNCTIONS IN CASES OF, 456–458.
what are, 457.
colorable imitations of, 458.

TRESPASS, DESTRUCTIVE, INJUNCTIONS IN CASES OF, 435–437.
in cases of public companies, 437.

TRUSTS, DEFINITION OF, 20, 49.
early jurisdiction of chancery as to, 8.
are either active or passive, 20.
special or simple, 20.
may be created either by act of party or by act of law, 20.
express and implied, 20.
origin, history, and general nature of, 49–62.
distinction between, and *fidei commissa*, 50.
origin of, 51.
early history of, 51.
distinction between and a technical use, 52.
history of, before the Statute of Uses, 52.
after the Statute of Uses, 53.
general nature of, active and passive, 54.
when executed by the statute, 55.
by common law, in some States, 55.
abolished in some States, 55.
lawful and unlawful, 56.
executed and executory, 20, 57.
Glenorchy *v.* Bosville, 57.
Sackville-West *v.* Homesdale, 57.
executory, instruments creating, when reformed, 58.
public and private, 20, 59.
descent of, 60.
created by direct fiduciary expressions, 63.
averrable at common law, 63.
as affected by the statute of frauds, 64.
by what language created, 65.
intention to create must be complete, 65.
voluntary dispositions; Milroy *v.* Lord; Ex parte Pye, 66.
Donaldson *v.* Donaldson; Kekewich *v.* Manning, 67.
when revocable, 67.
for benefit of creditors, 68.

TRUSTS—*Continued.*
upon meritorious considerations; Ellis *v.* Nimmo, 69.
created by precatory words, 20, 71.
doctrine of precatory, applied cautiously, 72.
what are precatory words, 73.
rules as to precatory, 74, 75, 76.
powers in trust, 20, 77.
implied. [See IMPLIED TRUSTS], 78–95.
resulting. [See RESULTING TRUSTS], 20, 79–90.
Constructive. [See CONSTRUCTIVE TRUSTS], 20, 91–95.
Ex maleficio, 91, 210, 218.
for married women. [See MARRIED WOMEN; SEPARATE USE; PIN-MONEY; EQUITY TO A SETTLEMENT; GIFTS; SEPARATION], 96–115.
for charities. [See CHARITIES], 116–134.

TRUSTS FOR CHARITABLE PURPOSES. [See CHARITIES], 20, 116–134.

TRUSTS FOR MARRIED WOMEN. [See MARRIED WOMEN; SEPARATE USE; EQUITY TO A SETTLEMENT; GIFTS; PIN-MONEY], 20, 96–115.

TRUSTEES, 20, 135–148.
jurisdiction of courts of equity over, 20, 135.
cannot use their position to their own advantage, 92.
Keech *v.* Sanford (Rumford Market Case), 92.
cannot purchase at their own sale, 94.
sometimes allowed to bid, 94.
who may be, 136.
corporations may be, 136.
acceptance of trust by, 137.
general duties of, 138.
conversion of securities by, 139.
deposits by, 139.
investments by, 140.
English rule as to, 140.
rule in the United States as to, 141.
when chargeable with interest, 142.
disabilities of, 143.
Rumford Market Case, 143.
compensation of, 144.
cannot delegate their authority, 145.
responsibility of, for co-trustees, 146.
Townley *v.* Sherbourne, 145.
Brice *v.* Stokes, 145.
remedies against, 147.
accounts of, 148.

TRUSTEE AND *CESTUI QUE TRUST*, TRANSACTIONS BETWEEN, 237.

TRUST FUNDS, MAY BE FOLLOWED, 86.

UNDUE INFLUENCE, GIFTS MADE UNDER, 231.
contracts made under, 232.
Huguenin *v.* Baseley, 231.
Smith *v.* Kay, 232.
Tate *v.* Williamson, 232.
relations of, 233.
guardian and ward, 234.
parent and child, 235.
solicitor and client, 236.
trustee and *cestui que trust*, 237.
executors and administrators, 237.
directors of companies, 237.
agents, 237.
medical and religious advisers, 237.

UNITED STATES, PRINCIPLES OF EQUITY ADOPTED IN, 12.
classification of the States in, 2, 15.

UNLAWFUL TRUSTS, 56.

USES. See TRUSTS; CHARITABLE USES.
Statute of, 10, 53.

USURIOUS CONTRACTS, 221.

VENDOR'S LIEN FOR PURCHASE-MONEY, 353-356.
nature of, 354.
how waived, 355.
exists for and against whom, 356.
distinction between, and vendor's estate, 364.

VERMONT, EQUITABLE JURISDICTION OF THE COURTS IN, 15, *note*.

VEXATIOUS LITIGATION, INJUNCTIONS TO RESTRAIN, 413.

VIGILANTIBUS NON DORMIENTIBUS ÆQUITAS SUBVENIT, 39.

VOLUNTARY ASSIGNMENTS FOR BENEFIT OF CREDITORS, 68.

VOLUNTARY DISPOSITIONS IN TRUST, 66.
Bond *v.* Bunting, 67. (page 104, *note* 2).

VOLUNTARY TRANSFERS, AS AGAINST CREDITORS, 243, 245, 247, 248.

WALTHAM, JOHN DE, ERRONEOUSLY SUPPOSED TO HAVE INVENTED THE SUBPŒNA, 9.

WARD OF COURT,
when infant made a, 543.
to be a, infant must have property, 544.
how constituted, 545.
education of, 548.
management of estate of, 549.
marriage of, 550.

WASTE, INJUNCTIONS TO RESTRAIN, 429–434.
common-law remedies in cases of, 430.
reasons for equitable remedy in cases of, 431.
nature of, 432.
parties who will be restrained from committing, 433.
equitable, 434.

WESTMINSTER THE SECOND, STATUTE OF, 7.

WIFE'S EQUITY TO A SETTLEMENT. [See EQUITY TO A SETTLEMENT.]

WILL, FRAUD IN OBTAINING A, 199.
trust created by, 64.

WILLS, BILLS TO ESTABLISH, 574.
jurisdiction to correct mistakes in, 196.

WINDING-UP OF PARTNERSHIP, 515.

WITNESSES, COMMISSIONS TO EXAMINE ABROAD, 567.